# MISSISSIPPI LAW JOURNAL

## CORRECTIONS: A SYMPOSIUM ON PRISON REFORM

**FOREWORD**

*Honorable J. Braxton Craven, Jr.*
*United States Circuit Judge, United States Court of Appeals, Fourth Circuit*

**PSYCHIATRIC VIOLENCE AGAINST PRISONERS: WHEN THERAPY IS PUNISHMENT**

*Edward Opton*
*Associate Dean of the Graduate School, The Wright Institute, Berkeley, California*

**THE "CLOSING" OF O WING AT SOLEDAD PRISON: REFLECTIONS ON THE USE OF LOCK-UP**

*Fay Stender*
*Former Director of the Prison Project in San Francisco, California*

**PSYCHIATRY IN CORRECTIONS: A VIEWPOINT**

*Charles E. Smith, M.D.*
*Professor at University of North Carolina Medical School*

**MISSISSIPPI'S PRISON EXPERIENCE**

*David Lipman*
*Director, Mississippi Prisoners Defense Committee*

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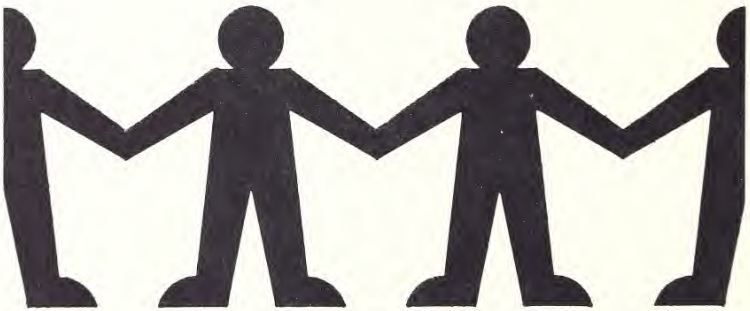

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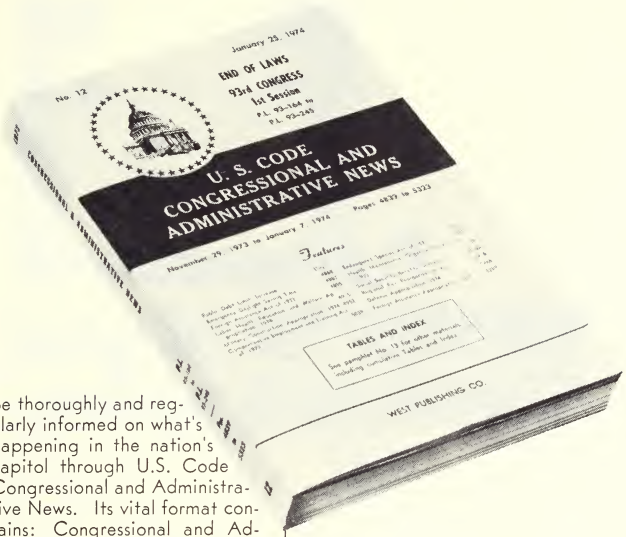


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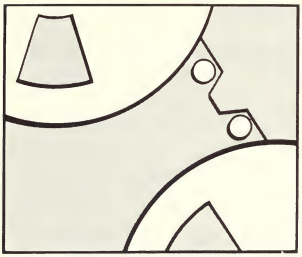
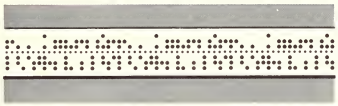
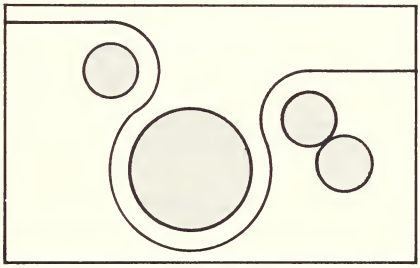
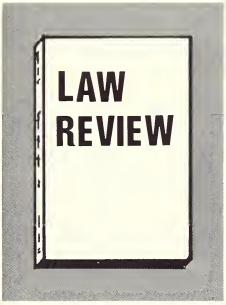


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# FOREWORD

*J. Braxton Craven, Jr.**

Human institutions evolve. One of Jesus' disciples could scarcely be expected to recognize the state of His catholic church today. Usually change is for the better, but sometimes institutions evolve in such a way that the original purpose is lost or obscured. This kind of destructive evolvement can afflict institutions originally created for noble purposes. *In re Gault*[1] recites the regressive turning inward of a juvenile court system that now sometimes denies fundamental rights to the very children it was created to benefit. Nineteenth century protective legislation for women is now viewed by some as intolerably restrictive and paternalistic.

It is widely suggested that there are few penitents in penitentiaries. If that be true, then the institution of the prison has turned nearly 180 degrees and no longer serves its intended purpose—except for the exceedingly few within prison walls who truly repent, meditate upon their derelictions, and are resolved to reenter society as good citizens.

It is hard to judge others except by one's own standards and values. Penitentiaries were an enlightened substitution for a regime of inhumane corporal punishment in which the hand of the thief was cut off, the adulterer branded with a hot iron, and the misdemeanant flogged with a cat-o'-nine-tails or subjected to the rack and the screw. With our Puritan heritage it is not surprising that enlightened men of good will, truly believing in the therapy of confession and penitence, decided to risk permitting the thief to keep his hand, and instead incarcerated him to meditate upon and repent his sin against society.

The penitentiary was a vast improvement over maiming offenders in the name of the state. But if there is now little penitence in the penitentiaries, it is time to reexamine the institution and see whether it can be restored, and if not, to seek other alternatives. The goal remains the same: to protect society from destructive elements within it, with the least possible destruction of the offender.

My nomination for candid quote of the year goes to Norman A. Carlson, Director of the Federal Bureau of Prisons, who said: "The only thing we can say with any degree of certainty is that we still know very little about how to deal effectively with offenders. It is ludicrous to pretend otherwise." It is not surprising that we are confused, because

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[1]387 U.S. 1 (1967).

society has never been able to agree upon the purposes of criminal sanctions. Four purposes are frequently suggested, the first of which is the most noble, and the second of which is important with respect to crimes of violence. As for number three, no one knows whether it works, and the best that can be said for number four is that it continues to well up from springs deep within human nature.

(1) Rehabilitation, to aid the offender in adjusting to law-abiding society;
(2) Incapacitation by confinement, to prevent an offender who is likely to repeat from committing other offenses;
(3) Deterrence, to discourage other offenders by making an example of one; and
(4) Retribution.

I believe the time is now ripe for a national effort to increase reform and rehabilitation of offenders. The idea is fueled by practical common sense and supported by society's self-interest. No matter how many millions it may cost to educate and train the prison population for employment, it seems beyond argument that it would be far less than the cost of recurrent crime and the cost of keeping people penned up. To our misfortune, leniency from the bench and liberality from the parole board requires much more moral courage than does harshness. Perhaps because we are a young country, we continue to treat persons convicted of crime, especially crimes against property and offenses against moral concepts, more harshly than any other civilized nation. Legislatures seem unable to resist filling criminal codes with their own notions of moral behavior. I devoutly wish that prosecutors, police, and prison administrators were relieved of the obligation to police morals and freed to concentrate their efforts on offenders who have committed "real" crimes; *i.e.*, those of violence and serious deprivations of property. "Victimless" crimes are not susceptible to the criminal sanction. For example, alcohol and other drug use or abuse, including marijuana, can best be left to the influence of psychiatry, medicine, and the church.

When I became a United States circuit judge, I expressed relief that I would never again have to sentence another human being to a penitentiary. I had done it for 10 years—5 years as a judge of the Superior Court of North Carolina and 5 years as a United States district judge—and I had had enough. I am utterly convinced that no judge, not even a Solomon, is wise enough to determine precisely how long, or even whether, a man ought to be in prison.[2] Parole boards can determine duration

[2]I recently had occasion to sit as a district judge to resentence a bank robber I had sentenced in 1966. United States v. Miller, 361 F. Supp. 825 (W.D.N.C. 1973), is an exposition of my doubts as to the qualifications of judges for the sentencing process.

better than judges, not because they are smarter, but because they have more information about the offender and because the information they have is more reliable; *e.g.*, how he gets along with other prisoners, his attitude toward prison employees, willingness to work, and general behavior. Because of this I used to think all sentences ought to be indeterminate. But now I am not so sure. The indeterminate sentence, like the penitentiary itself, was intended to be an instrument of enlightened reform and a boon to the offender. But as presently administered, I have come to wonder if the indeterminate sentence is not a cruelty device. If I were myself confined at the Atlanta Penitentiary, I think I might well prefer to cross off the days on a flat 3-year sentence than to face the uncertainty of a not-less-than-1-year-nor-more-than-10-year sentence.

Finally, a word about disparity of punishment—the greatest single demoralizing factor in prison. When I was a sentencing judge, I used to wish fervently that my imprisonment decisions could be reviewed by my superiors. Sooner or later some sort of appellate review of sentences is inevitable. We are the only important civilized country in the world that permits *one* judge finally and irrevocably to determine punishment—so long as it is within the statutory maximum. Senseless disparity is intolerable. For example, William J. Zumwalt in an article for the American Judicature Society[3] reports that in my own circuit, the courts in the Eastern District of Virginia are "consistently more severe than any other Fourth Circuit court averaging, offense by offense, a full year above the standard Circuit sentence."[4] The Zumwalt article also suggests that if one is disposed to commit a crime in Oklahoma, it is wise to choose the Eastern District rather than the Northern District because the average sentence in northern Oklahoma is 44 months longer.

I highly commend the *Mississippi Law Journal* for the imaginative concept and superb implementation of this special issue of the *Journal*. I am acquainted with many of the contributors. These are people who can think creatively and innovatively and who dare do it. The present situation of high crime and harsh punishment's complete failure to solve it imperatively calls for innovative and creative study. I hope that no suggestion will be declared out of bounds because it is novel and has not been tried. I used to think that I should either send an offender to prison *or* turn him loose and that putting special conditions upon probationary release was too much an invasion of personal liberty and was perhaps even unconstitutional. I now think such a notion needs, at the least, reexamination and that it might be a good idea to try formulating detriments, deprivations, and controls short of imprisonment. For example,

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[3]Zumwalt, *The Anarchy of Sentencing in the Federal Courts*, 57 JUDICATURE 96 (1973).
[4]*Id.* at 97.

the alcoholic offender might be compelled to seek psychiatric help or even required to attend AA meetings, although making him attend church, even his own church, [I have known judges who did it] might well offend the first amendment. Instead of imprisoning a high school offender, might it be better to deprive him of "wheels" and arrange for his weekends to largely consist of picking up beer cans and trash from streets and highways?

# PSYCHIATRIC VIOLENCE AGAINST PRISONERS: WHEN THERAPY IS PUNISHMENT*

*Edward M. Opton, Jr.***

## I. THERAPY-AS-PUNISHMENT

When is torture not torture?
When it is aversion therapy.[1]

When is brutality legal?
When it is behavior modification.[2]

---

*Portions of this article were presented at a symposium of the American Psychology-Law Society, "Violence by Public Officials," at the Annual Meeting of the American Psychological Association, Montreal, August 30, 1973, under the title, *Coercive Psychological and Psychiatric Treatment as a Rationalization for Official Violence.* I am grateful for criticisms of that manuscript by Fay Stender, Lillian Rubin, and other colleagues. The material in this article will appear in different form in A. SCHEFLIN & E. OPTON, THE MIND MANIPULATORS (1975).

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[1]Mattocks & Jew, Assessment of an Aversive Treatment Program with Extreme Acting-Out Patients in a Psychiatric Facility for Criminal Offenders (unpublished report, California Medical Facility, Vacaville, on file with the University of Southern California Law Library, undated). This report differs from the manuscript submitted to *Archives of General Psychiatry* in April 1970. A similar program at Atascadero (Cal.) State Hospital was reported in Reimringer, Morgan, & Bramwell, *Succinylcholine As A Modifer of Acting-Out Behavior,* CLINICAL MEDICINE, July 28, 1970, at 28. For allegation that aversion therapy in prisons is torture see text accompanying note 53 *infra.* For a critical discussion see Note, *Conditioning and Other Technologies Used to 'Treat?' 'Rehabilitate?' 'Demolish?' Prisoners and Mental Patients,* 45 S. CAL. L. REV. 616, 629-31 (1972) [hereinafter cited as *Conditioning*]. For cases alleging aversion therapy is cruel and unusual punishment, see Knecht v. Gillman, 488 F.2d 1136 (8th Cir. 1973); Mackey v. Procunier, 477 F.2d 877 (9th Cir. 1973). For the historical tradition of imposition of torture under guise of therapy, see T. SZASZ, THE MANUFACTURE OF MADNESS 147-51 (1970) [hereinafter cited as SZASZ]. For use of aversion therapy outside prisons, see Kushner & Sandler, *Aversion Therapy and the Concept of Punishment,* 4 BEHAVIOUR RESEARCH & THERAPY 179 (1966); and for specific instances, see *e.g.,* Ludwig, Marx, Hill & Browning, *The Control of Violent Behavior Through Faradic Shock,* 148 J. NERVOUS & MENTAL DISEASE 624 (1969); Ramey, *Use of Electric Shock in the Classroom: The Remediation of Self-Abusive Behavior of a Retarded Child,* 1 BEHAVIORAL ENGINEERING 4 (No. 2, Fall-Winter 1973-74). It may be indicative of standards in the aversion therapy area that in Mr. Ramey's article, which reports an experiment on an 11-year-old boy, the shock level was set, without preliminary testing, at the maximum intensity of which the device was capable. Mr. Ramey did not know or attempt to measure the shock intensity, but estimates it at 200 volts with an average current of 4 milliamperes. *Id.* at 9. No mention is made of consent for this experiment, informed or otherwise, from the child or his parents.

[2]Neier & Mares, *A Program to Cripple Federal Prisoners,* 21 THE NEW YORK REVIEW

When is capital punishment imposed without trial?
When the lobotomist's knife slices into the brain.[3]

When is brainwashing morally justified?
When it is done for a good purpose.[4]

When is punishment by the State not regulated by law?
When it is prescribed by a psychiatrist.[5]

According to some partisans of prisoners' rights, these conundrums fairly summarize an alarming trend toward the misuse of psychiatry to sanction acts of violence against prisoners. Representatives of defendant institutions in cases involving these issues say that such characterizations are gross distortions,[6] that litigation is an unwarranted attempt to interfere with medical discretion,[7] and that denial of necessary medical treatment would be the real cruelty.[8] While the outcome of some recent

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OF BOOKS 23 (March 7, 1974). For challenges to allegedly brutal behavior modification programs, see Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973); Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973). *See generally* Wexler, *Token and Taboo: Behavior Modification, Token Economies and the Law*, 61 CALIF. L. REV. 81 (1973).

[3]For the allegation that psychosurgery is partial capital punishment, see Breggin, *The Return of Lobotomy and Psychosurgery*, 118 *Cong. Rec.* E1602 (daily ed. Feb. 24, 1972), E3379 (daily ed. Mar. 30, 1972). *See also* Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich., Cir. Ct., July 10, 1973), *exerpted at* 42 U.S.L.W. 2063 (July 31, 1973).

[4]McConnell, *Criminals Can Be Brainwashed—Now*, 3 PSYCHOLOGY TODAY 14 (April, 1970); Schein, *Man Against Man: Brainwashing*, 8 CORRECTIVE PSYCHIATRY & J. SOCIAL THERAPY 90 (1962).

[5]Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968); R. SCHWITZGEBEL, DEVELOPMENT AND LEGAL REGULATION OF COERCIVE BEHAVIOR MODIFICATION TECHNIQUES WITH OFFENDERS 37 (Dept. of Health, Education, and Welfare Pub. No. (HSM) 73-9015, 1971); *Conditioning. See generally* SZASZ.

[6]N. Carlson, Director, Federal Bureau of Prisons, Statement Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, of the House Comm. on the Judiciary, *Concerning 'Behavior Modification' and the Federal Center for Correctional Research,* Butner, North Carolina 4 (Feb. 27, 1974).

[7]"The definition of treatment and the appraisal of its adequacy are matters for medical determination." Council of the American Psychiatric Association, *Position Statement on the Question of Adequacy of Treatment,* 123 AM. J. PSYCHIATRY 1458 (1967). This was a response to, and criticism of, Chief Judge Bazelon's opinion in Rouse v. Cameron, 373 F.2d 451 (D.C. Cir. 1966).

[8]"The banning of these [behavior modification] procedures will result in a regression to outmoded, unsystematic forms of inhumanity in prisons . . . [and] will tend to stifle the development of humane forms of treatment that provide the offender the opportunity to fully realize his or her potential as a contributing member of society." American Psychological Association press release, Washington, D.C. (Feb. 15, 1974). Commenting on Anectine aversion therapy (Mattocks & Jew, *supra* note 1), the Assistant Superintendent, Psychiatric Services (now Superintendent) of the California Medical Facility [prison] at Vacaville wrote: "In my opinion, prisoners have a right to the best medical care, including

litigation has favored the plaintiff prisoners' position,[9] this litigation concerns only a few especially egregious abuses of psychiatric power. The bulk of psychiatrically sanctioned punitive violence against prisoners remains untested in the courts, or tested and legitimated by the courts.[10] It is the thesis of this article that the disinclination of the courts to grapple with the problems of violence by psychiatrists against prisoners represents a blind spot, the logical center of which is the insistence on a distinction between treatment and punishment.

The distinction is crucial, for punishment is regulated both by law and by the all but universal power of a common morality: "let the punishment fit the crime." The varieties, degrees, durations and circumstances of legal punishments are specified by law, circumscribed by administrative rules, and subject to scrutiny by the courts, especially with respect to constitutional requirements of due process and prohibition of cruel and unusual punishments.

Treatment, on the other hand, is a medical term, meaning "management in the application of remedies; medical or surgical application or service."[11] Since it is a "service" for the benefit of a patient, one does not ordinarily ask whether a treatment is cruel and unusual or whether it has been imposed through due process. Courts have been most reluctant to entertain such questions, and it should not be surprising, therefore, if prison administrators have from time to time labeled as "treatment" acts which, if called "punishment," would be instantly recognized as of dubious morality or legality. To label acts "treatment" requires the cooperation of medical personnel; thus do psychiatrists and psychologists become involved in violence[12] against prisoners.

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in some cases, new treatments as they become available in the community. Otherwise, one is in the position of keeping people out of free society because of their dangerous behavior . . . ." Clanon, *Letter to the Editor,* 1 BULL. OF THE AM. ACADEMY OF PSYCHIATRY & THE L. 61, 68 (1972).

[9]Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973); Kaimowitz v. Department of Mental Health, Civil No. 73-19434-AW (Wayne County, Mich., Cir. Ct., July 10, 1973). In Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973), the Federal Bureau of Prisons has announced its intention to terminate the challenged "START" behavior modification program for "economic" reasons, perhaps anticipating an unfavorable ruling. *Cf.* Carlson, *supra* note 6.

[10]*E.g.*, Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968).

[11]THE OXFORD UNIVERSAL DICTIONARY (3d ed. 1955).

[12]Not all punishment is violent, but those punishments for which the cooperation of psychiatrists is sought or accepted generally are violent, as no special medical sanction is needed for non-violent punishments. The meanings of "punishment" and "violence" are important here. Punishment by public authority is "to cause (an offender) to suffer for an offence." Violence is "the exercise of physical force so as to inflict injury on, or cause damage to, persons . . . or forcibly interfering with personal freedom." "Violent" means "using physical force or violence, esp. in order to injure, control, or intimidate others." THE COMPACT EDITION OF THE OXFORD ENGLISH DICTIONARY (1971).

Mental health professionals seldom if ever think of themselves or their colleagues as participants in violence against prisoners.[13] Rather, they think of themselves as treating prisoners. However, the difference between a violent punishment and a medical treatment lies not in the act itself, but in the intent of the actor. When a medical procedure is done at the request of a patient and for his benefit, it is a treatment. When the identical medical procedure is done against a person's interests or will, it is either a battery, if lacking legal sanction, or a punishment, if imposed by legal authority. For example, when a surgeon amputates a diseased hand in order to prevent the spread of gangrene, he performs a medical treatment. Were he to remove his rival's hand in a fit of jealousy, he would commit a battery. If he were a Libyan surgeon amputating a thief's hand in accordance with his nation's laws,[14] as duly ordered by a judge, he would be the instrument of an official punishment. Amputation with the intent of treating gangrene is not violence, but amputation with the intent of injuring a rival would be a violent battery, and amputation with the intent of discharging a court-ordered punishment would be legally sanctioned violence carried out by medical personnel.[15] Such legally sanctioned, punitive violence, administered by psychiatrists or under their aegis, is increasingly common in American prisons. The use of mind-altering drugs for punishment or control is the most common instance; behavior modification programs are rapidly multiplying. Aversion therapy is not uncommon, psychosurgery is done occasionally, and allegations have been made that programs much like thought reform[16] ("brainwashing") as carried out on American prisoners during the Korean War and in the People's Republic of China during the years following 1949, are presently being employed.

Both legal and psychiatric writers have long maintained a distinction between treatment and punishment, a distinction which this article will argue is specious. Thus, in *Sanchez v. Ciccone,*[17] plaintiffs alleged that the "START" (Special Treatment and Rehabilitative Training) program was a punishment; the Federal Bureau of Prisons replied that

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[13]SZASZ, *supra* note 1, at 150-51, and *passim,* is a notable exception. Although primarily concerned with mental patients, Szasz considers the distinction between involuntary mental patients and prisoners to be a euphemistic legalism.

[14]"A new law in Libya provides for amputation of the right hand for stealing, and the left foot for armed robbery—but permits it to be done by a surgeon, using anesthetics." Hilton, *Marcus Welby, Executioner,* 3 THE HASTINGS CENTER REPORT 16 (1973).

[15]The fact that a punishment may be legal does not mean it is less properly classified as violence. All governments attempt to monopolize violence and to exercise it through military, police, and penal branches.

[16]R. LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM; A STUDY OF "BRAINWASHING" IN CHINA (1961).

[17]No. 20182-4, 3061-4 (W.D. Mo. 1973).

it was a behavior modification treatment, a recognized form of psychological therapy. Both sides assumed that START must be the one or the other. In Schwitzgebel's monograph,[18] regulation of coercive therapies is discussed almost solely in terms of treatment; punishment and its regulation is scarcely mentioned. A recent law review article[19] on cruel and unusual punishments cites a number of recent cases in which complete lack of treatment has been found unacceptable by the courts, but not a single case in which a treatment has been ruled an unconstitutionally cruel and unusual punishment.[20] Morris comes close to seeing an identity between some treatments and punishment when he writes: "[E]arly [psychiatric] treatment methods were barbaric and the mentally ill often suffered as much as the prisoners who were being punished. . . . For the first time, the treatment accorded the mentally ill can be clearly differentiated from the punishment accorded criminals."[21] However, Morris does not raise the question whether punitive treatments ought to be legally restricted as punishments. Brodsky has a section called "Clinical Injustice" in his book, but the injustices discussed are limited to misdiagnosis; mistreatment is not considered.[22] Aronson[23] comes very close to noting the congruity between some psychiatric treatments and punishment, and comments on the due process implications:

> An examination of the purposes and effect of "civil" commitment reveals that unless effective treatment is provided such commitment would be criminal in nature . . . .
>
> Clearly, where the primary purpose of commitment is punishment, the proceedings are criminal.
>
> . . . .
>
> Other traditional aims of punishment are also present. . . . [T]o the extent that commitment incarcerates individuals indefinitely—possibly for life—on the possibility of future dangerousness, it constitutes a form of preventive detention and is thus penal in nature.

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[18]R. SCHWITZGEBEL, *supra* note 5.

[19]Note, *Recent Applications of the Ban on Cruel and Unusual Punishments: Judicially Enforced Reform of Nonfederal Penal Institutions,* 23 HASTINGS L.J. 1111, 1120-23 (1972).

[20]*But cf.* Wyatt v. Stickney, 344 F. Supp. 373, 380 (M.D. Ala. 1972): "Patients have a right not to be subjected to treatment procedures such as lobotomy, electro-convulsive treatment, adversive [*sic*] reinforcement conditioning or other unusual or hazardous treatment procedures without their express and informed consent . . . ." Will Judge Johnson's conclusion be extended to prisoners?

[21]Morris, *"Criminality" and the Right to Treatment,* in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 109, 110-11 (Morris ed. 1970) (citations omitted) [hereinafter cited as RIGHT TO TREATMENT].

[22]H. BRODSKY, PSYCHOLOGISTS IN THE CRIMINAL JUSTICE SYSTEM 143-44 (1970).

[23]Aronson, *Should the Privilege Against Self-Incrimination Apply to Compelled Psychiatric Examinations,* 26 STAN. L. REV. 55 (1973).

> And where no treatment is provided, commitment would seem to include a retributive element as well.
>
> Other deprivations attendant to commitment may also mandate criminal due process safeguards. . . . [P]unishment may also be inflicted upon the individual, making his life miserable. Techniques such as solitary confinement, shock treatment, and overuse of stupefying drugs are often employed. . . .
>
> Finally, conditions at many mental institutions are as bad as, if not worse than, conditions in prisons.[24]

Aronson might logically have concluded that some treatment provided to committed mental patients is indistinguishable from punishment, indeed *is* punishment, and that therefore due process safeguards should be provided. Instead, he reasons:

> However, if sufficient treatment is being offered, such treatment could be construed to be an acceptable "alternative purpose" of commitment. The existence of adequate treatment would then be sufficient to render the proceeding "civil" . . . . It is essential, therefore, to determine whether treatment is presently being provided at mental institutions.
>
> . . . .
>
> The analysis proposed in this Article concludes that when commitment is equivalent to criminal incarceration . . . and no treatment is given, the privilege against self-incrimination should apply. However, . . . where treatment is in fact being given following involuntary civil or postconviction commitment, application of the privilege is not desirable.[25]

Thus, Aronson does not grapple with, or even recognize, the central question: Are constitutional safeguards appropriate when treatment *is* punishment?

### *A. History of Therapy-as-Punishment*

The idea that psychiatric treatment and punitive violence are necessarily distinct in fact or in concept is not sustained by history. Treatment by punitive violence is very old, going back at least to December 9, 1484, when Pope Innocent VIII issued a Bull establishing the Inquisition: "We . . . decree and enjoin that the aforesaid Inquisitors be empowered to proceed to the just correction, imprisonment, and punishment of any persons, without let or hindrance . . . ."[26] The citation of

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[24] *Id.* at 73-75 (citations omitted).

[25] *Id.* at 76, 93.

[26] J. SPRENGER & H. KRAMER, MALLEUS MALEFICARIUM xix-xx (London: Pushkin Press 1948) (orig. ed. 1486).

Pope Innocent's Bull by Fr. Sprenger and Fr. Kamer in the introduction to their famous bible of witch-hunting[27] strongly suggests that "correction" and "punishment" were understood as synonyms, for the correction-punishment the Inquisition prescribed for witches was death.

Szasz states:

> The pious inquisitor would undoubtedly have been enraged at the suggestion that he was the heretic's foe, not his friend. Likewise, the institutional psychiatrist angrily rejects the idea that he is the involuntary patient's adversary, not his therapist. In denying this interpretation, the inquisitor would have countered with the assertion that his ministrations—including burning the victim at the stake—were aimed at saving the heretic's soul from eternal damnation; while the psychiatrist replies that his efforts—including lifelong imprisonment, electric convulsions, and lobotomy—are aimed at protecting and promoting the patient's mental health.[28]

Incredible as it may seem, the tortures of the Inquisition were rationalized as solely for the benefit of the accused heretic or Jew. Lea, in his authoritative history of the Spanish Inquisition, writes:

> In theory the object of the Inquisition was the saving of souls. . . . The penalties inflicted on the repentant were not punishment but penance, and he was not a convict but a penitent[29]. . . .
>
> Theoretically it had no power to inflict punishment . . . . Its sentences, therefore, were not, like those of an earthly judge, the retaliation of society on the wrong-doer, or deterrent examples to prevent the spread of crime; they were simply imposed for the benefit of the erring soul, to wash away its sin.[30]

The combination of the idea of treatment-therapy-correction with punishment did not wane with the witch-hunts, but was transferred to a class of people newly selected as embodiments of dangerous deviance: the mentally ill.[31] The "father" of American psychiatry, Benjamin Rush, whose face appears on the official seal of the American Psychiatric Association,[32] believed that almost all deviation from his own opinions constituted insanity. Such deviations included political deviations such as

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[27]MALLEUS MALEFICARUM, *supra* note 26.

[28]SZASZ, *supra* note 1, at 51.

[29]2 H. LEA, A HISTORY OF THE INQUISITION OF SPAIN 569 (1906-07), *quoted in* SZASZ, *supra* note 1, at 55.

[30]H. Lea, THE INQUISITION OF THE MIDDLE AGES: ITS ORGANIZATION AND OPERATION 155 (Citadel ed. 1961), *quoted in* SZASZ, *supra* note 1, at 54.

[31]SZASZ, *supra* note 1, *passim*.

[32]*Id.* at 138.

*anarchia,* an "excess of the passion for liberty"[33] and *revolutiona,* or opposition to the American Revolution.[34] Non-political crimes such as murder and theft were also mental diseases in Rush's view,[35] and so were sins such as lying.[36] The treatments for these diseases were oddly like criminal punishments. The only remedy for the disease of lying, Rush wrote, is "bodily pain, inflicted by the rod, or confinement or abstinence from food."[37] "Terror" was a favorite treatment, for it "acts powerfully upon the body, through the medium of the mind, and should be employed in the cure of madness."[38]

> By the proper application of these mild and terrifying modes of punishment, chains will seldom and the whip never, be required to govern mad people. I except only from the use of the latter, those cases in which a sudden and unprovoked [sic!] assault of their physicians or keepers may render a stroke or two of the whip, or of the hand, a necessary measure of self-defense.[39]

The reader will have noticed that in the preceding quotation Rush did not disguise punishment as treatment, but frankly acknowledged that punishment *is* treatment. Nor did he shrink from other heroic punishment-therapies: "confinement by means of a strait waistcoat . . . privation of their customary pleasant food . . . pouring cold water under the coat sleeve . . . ."[40] He also recommended blood-letting and solitary confinement in the dark. He even used a "tranquilizer," but not having the modern psychopharacopoeia at his disposal, his tranquilizer was an adaptation of an inquisitorial torture chair. In Rush's adaptation "the tranquilizer consisted of a chair into which the patient was strapped hand and foot, together with a device for holding the head in a fixed position."[41] Deutsch comments, "[a]lthough it would be viewed by moderns as a device of fiendish torture, it was really invented by Rush out of humane considerations."[42] The present writer regards Deutsch's distinction between torture and humane considerations as

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[33]*Id.* at 140, *quoting* B. Rush *as cited in* D. Boorstin, The Lost World of Thomas Jefferson 182 (1948).

[34]*Id.*

[35]Szasz, *supra* note 1, at 142-53, *quoting* B. Rush *as cited in* C. Binger, Revolutionary Doctor: Benjamin Rush, 1746-1813, 281 (1966).

[36]Szasz, *supra* note 1, at 142-53, *quoting* B. Rush, Medical Inquiries and Observations upon the Diseases of the Mind 265 (Hafner ed. 1962) (orig. ed. 1812).

[37]B. Rush, *supra* note 36, at 265-66.

[38]*Id.* at 175.

[39]*Id.* at 183.

[40]*Id.* at 181-92.

[41]Szasz, *supra* note 1, at 149, *quoting* A. Deutsch, The Mentally Ill in America: A History of Their Care and Treatment from Colonial Times 79 (2d ed. 1952).

[42]*Id.*

erroneous. Rush, like the inquisitors, believed that when one was struggling to free a victim from the devil, or from mental illness,[43] torture, as the most effective therapy, was therefore the only humane treatment.

Dr. Rush was also a father of American penology. His prescription of solitary confinement for the punishment-therapy of crime-mental disease was put into practice in one of America's first prisons, the Walnut Street Jail, and later in the Eastern State Penitentiary, Philadelphia, in 1789.[44] Rush's treatment philosophy dominated the rapidly expanding American prison system for the next 100 years. Lay observers, unable to appreciate the scientific basis of solitary confinement therapy, sometimes had harsh words for it. Thus, Charles Dickens, reporting on his trip through the former colonies in 1842, wrote:

> I believe it, in its effects, to be cruel and wrong. In its intention, I am well convinced that it is kind, humane, and meant for reformation; but I am persuaded that those who devised this system of prison discipline . . . do not know what it is they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this terrible punishment . . . inflicts upon the sufferers . . . . I hold this slow and daily tampering with the mysteries of the brain, to be immeasurably worse than any torture of the body.[45]

It should be noted that the father of American psychiatry did not shrink from prescribing therapeutic punishment for a member of his family. For his first-born son, John, also a physician, who manifested "grief and uncombed hair and long beard"[46] after killing a close friend in a duel, Rush prescribed solitary confinement therapy. John was locked in a cell in his father's Pennsylvania Hospital continuously, except for one leave of 6 days, for 27 years until he died.[47]

### *B. Punishment-as-Therapy Today*

"Treat the criminal as a patient and the crime as a disease,"[48] said

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[43]Mental illness, broadly conceived, included political and moral deviation. See text accompanying notes 33 through 36 *supra*.

[44]W. Nagel, The New Red Barn: A Critical Look at the Modern American Prison (1973).

[45]*Id.*

[46]B. Rush, The Autobiography of Benjamin Rush: His "Travels Through Life" Together with His "Commonplace Book" for 1789-1813, 288 (1948), *quoted in* Szasz, *supra* note 1, at 152.

[47]Szasz, *supra* note 1, at 152.

[48]American Correctional Association, Congress of Corrections Proceedings (1874), *quoted in* J. Mitford, Kind and Usual Punishment 96 (1973). For a contemporary version of the same sentiment, see K. Menninger, The Crime of Punishment (1968). For a review demolishing this position and Menninger's book, see Murphy, *Criminal Punishment and Psychiatric Fallacies*, 4 L. & Soc'y Rev. 111 (1969).

a prison warden at the 1874 Congress of the American Correctional Association. The warden's advice has often been heeded in subsequent years, but only in the last 20 years has punishment-as-treatment emerged from the shadowy fringes of the medical arts into the spotlight of scientific research. Solomon, a leading researcher on punishment of rats, noted in his presidential address to the Eastern Psychological Association in 1963 that scientific study of punishment had languished in the years 1930-55. "[P]erhaps a bit of softheartedness is partly responsible for limiting our inventiveness. (The Inquisitors, the Barbarians, and the Puritans could have given us some good hints! They did not have electric shock, but they had a variety of interesting ideas, which, regrettably, they often put to practice.) We clearly need to study new kinds of punishment in the laboratory. . . . Happily, there is now growing attention being paid to the effects of punishment on behavior . . . ."[49]

The ethics of behavior therapy, the category in which most scientific studies of therapy-as-punishment fall, have received some, but not much, attention from researchers and practitioners.[50] A typical textbook[51] allots less than 3 of 423 text pages to ethics, but does not, in this connection, mention punishment at all. Punishment is mentioned in a separate section of two pages,[52] but only in its technical aspects. Procedures which a leading prison psychiatrist has termed "torture"[53] are discussed—seven pages for aversion therapy with alcoholics alone[54] —but here neither punishment nor ethics is mentioned.

Punishment and its ethics in treatment have, however, occasionally been discussed in clinical circles. Lucero, Vail, and Scherber state:

> Many programs have employed such devices as electric shock grids, physical restraints (tying the patient to a bed or chair), prolonged seclusion, deprivation (usually of food and sleeping facilities), and, finally, outright punishment. In one instance, masses of patients were simply told, "If you don't work, you don't eat." . . . We in Minnesota have long thought that the status of the mental patient involves sufficient deprivation in itself and that any further, intentional measures could well reduce him to a subhuman level.[55]

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[49]Solomon, *Punishment*, 19 AM. PSYCHOLOGIST 239, 249, 252 (1964).

[50]*See, e.g.*, Kanfer, *Issues and Ethics in Behavior Manipulation*, 16 PSYCHOLOGICAL REP. 187 (1965); Krasner, *The Behavioral Scientist and Social Responsibility: No Place to Hide*, 21 J. SOCIAL ISSUES 9 (April 1965); Ulrish, *Behavior Control and Public Concern*, 17 PSYCHOLOGICAL RECORD 229 (1967).

[51]A. YATES, BEHAVIOR THERAPY (1970).

[52]*Id.* at 30-31.

[53]Groder, Program Development Coordinator, Federal Bureau of Prisons, Statement Before the Subcomm. on Courts, Civil Liberties, and Administration of Justice of the House Comm. on the Judiciary, Washington, D.C. (Feb. 27, 1974), manuscript at 8.

[54]A. YATES, *supra* note 51, at 310-16.

[55]Lucero, Vail, & Scherber, *Regulating Operant-conditioning Programs*, in CONTROL

Not all behavior therapists agree. In response to the statement by Lucero and his colleagues, Miron[56] replies that "[n]ot all programs labeled as operant conditioning are truly operant conditioning";[57] that "[t]he alternative to such use of contingent punishment may be a life spent in restraint";[58] and that "the purpose of seclusion is not punishment."[59] Most hospitalized people, Miron writes, are not incarcerated because they are ill,[60] but because someone in the outside community is "frightened, annoyed, repulsed, or angered by their behavior."[61] Since they cannot be released until they change their behavior, he writes, almost any measure including punishment is justified if it provides some hope of success.[62] Cahoon[63] and Miron[64] add the defense that the procedures attacked by Lucero and his colleagues replace standard psychiatric treatments that are more severe and hence more questionable: electroconvulsive therapy and psychosurgery. Ball[65] adds that operant conditioning programs are, in his opinion, more effective than other treatments; and Bragg and Wagner[66] go so far as to state that: "[h]ospital programs owe it to patients to have both rewards and punishments systematically integrated in the treatment programs . . . ." However, Lucero and Vail were not mollified: "[N]o one," they retort, "is going to be walking around on his own cognizance in any Minnesota state hospital bearing an electric cattle prod or whip or any similar engine or device. And if that is 'stultifying,' likewise so be it."[67]

A rare, perhaps unique, discussion of punishment-as-therapy has been published by an academic psychologist, Singer, in a legal journal.[68] At one point Singer states clearly that some therapies are also punish-

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OF HUMAN BEHAVIOR: FROM CURE TO PREVENTION 347 (Ulrich, Stachnik, & Mabry eds. 1970) [hereinafter cited as CONTROL].

[56]Miron, *Issues and Implications of Operant Conditioning: The Primary Ethical Consideration*, in CONTROL 348.

[57]*Id.*

[58]*Id.* at 349.

[59]*Id.*

[60]*Id.* at 350.

[61]*Id.*

[62]*Id.*

[63]Cahoon, *Issues and Implications of Operant Conditioning: Balancing Procedures Against Outcomes*, in CONTROL 351.

[64]Miron, *A Final Rejoinder*, in CONTROL 357.

[65]Ball, *Issues and Implications of Operant Conditioning: The Re-establishment of Social Behavior*, in CONTROL 353.

[66]Bragg & Wagner, *Issues and Implications of Operant Conditioning: Can Deprivation Be Justified?*, in CONTROL 353.

[67]Lucero & Vail, *Authors' Response: Public Policy and Public Responsibility*, in CONTROL 356.

[68]Singer, *Psychological Studies of Punishment*, 58 CALIF. L. REV. 405 (1970).

ments: "Aversion therapy is another potentially useful form of punishment."[69] To the central question of the current article—should punishment-as-therapy be regulated as treatment or as punishment? —Singer gives little attention, for he believes in the neutrality of Science:

> Science provides knowledge which society can use for good or ill. A scientist is no more qualified than any other man to place a value judgment on particular applications of his knowledge. He can inform society about the most expedient means to given ends; but he is not particularly qualified to judge whether these expedient means are ethical. . . . This Article considers how punishment can be used *effectively* to suppress criminal behavior . . . .[70]

However, later Singer proposes that "[t]he essential decisions on what [punishment] is ethical and what is viable . . . " be divided between "professionals in the criminological disciplines" and "the public."[71] "[B]oth the professionals and the public must decide the ethical issues involved,"[72] he concludes. Singer does not elaborate, so it is unclear whether he would welcome legal regulation of punishment-as-therapy as an expression of the "public" will, or whether he would reject it as uninformed interference with "professionals in the criminological disciplines."[73]

Singer's primary concern is with the effectiveness of punishment as a therapy, and on this subject he is, in the opinion of this psychologist, self-contradictory. Punishment *is* effective, he says, and notes that although Skinner[74] and Estes[75] "concluded that punishment is ineffective . . . and Skinner suggested that it be eliminated as a social instrument. . . . This is unfortunate, because it is wrong.[76] . . . The brutal fact, then, is that the more severe the punishment, the more effective it is in suppressing behavior."[77] At the risk of abandoning the ethical neutrality of science, Singer shifts to the imperative: "Make repeated punishments not only progressively more severe, but progressively much more severe."[78] In places he seems to have unlimited faith in the power of punishment-therapy:

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[69]*Id.* at 430.
[70]*Id.* at 410.
[71]*Id.* at 413.
[72]*Id.* at 442.
[73]*Id.*
[74]*See generally* B. SKINNER, THE BEHAVIOR OF ORGANISMS (1938).
[75]Estes, *An Experimental Study of Punishment,* 57 PSYCHOLOGICAL MONOGRAPHS No. 263 (1944).
[76]Singer, *supra* note 68, at 414.
[77]*Id.* at 414.
[78]*Id.* at 423.

> Given the time and the resources, a behavior therapy program could make a bank robber want to vomit every time he saw a bank.[79] . . . [S]uccess with clinical aversion therapy indicates that its extension to the treatment of many criminal offenses would be appropriate. . . . Punishment is clearly an effective means of eliminating behavior; under ideal conditions manipulating severity can provide any desired degree of suppression. We must determine what concrete manipulations of severity are effective for criminal treatments [*sic*] of humans.[80]

Punishment is most effective, Singer says, when the subject is completely helpless:

> [W]e know that allowing an organism a measure of control over its punishment will decrease the effectiveness of that punishment. . . . [F]or maximum punishment effectiveness we should not permit parole or "time off for good behavior." . . . [P]arole will probably decrease the effectiveness of incarcerative punishments.[81]

But contradictions abound. Six pages later he points out:

> The infliction of punishment on an organism in a situation where [it is helpless to escape] . . . causes the organism to become aggressive, compulsive, phobid, retarded, or neurotic. . . . This by itself suggests that we should not punish people's behavior without providing them with some alternative behavior through which they can escape punishment. . . . a mass of independent evidence suggests that this is not only desirable and necessary, it is more effective as well.[82]

Furthermore, because the prison is wholly unlike the "normal community environment, . . . on this basis alone we would predict that prison would be almost totally ineffective . . . ."[83] In fact: "[o]ne can also question whether it is ethical to continue to inflict punitive treatments when we have no knowledge that they help anyone and when we in fact suspect that in their present form they actually harm the offender and society."[84]

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[79] *Id.* at 433.

[80] *Id.* at 442.

[81] *Id.* at 422.

[82] *Id.* at 428.

[83] *Id.* at 435.

[84] *Id.* When an author has come down so squarely on both sides of the issue, it may seem superfluous to comment further. However it should be pointed out that the contradictions in Singer's conclusions are inherent in his sources of data, primarily experiments on caged laboratory rats. This writer's appraisal of the data on which Singer relies is that punishment effectively controls the behavior of some caged rats some of the time, but by no means shapes the behavior of all caged rats all of the time. Also, extrapolation from caged rats to caged men and women is extremely dubious and easily leads to contradictory

Two additional major reviews of the legal aspects of punishment-therapies have been published recently.[85] Both are responsive to the accelerating increase in the employment of punishment-as-therapy, especially in prisons.

The philosophy of punishment-as-therapy is not limited to drugs, electric shocks, confinement in isolation cells and other punishments carried out in prisons. The punishment-as-therapy concept is frequently applied to the fact of incarceration itself. Malmquist puts it thus:

> Nor can the issue of pain-infliction as a "reformative device" be ignored. This is based on the assumption that punishment reforms. Pain infliction then becomes the selected therapeutic technique. This may vary from naive disciplinary methods to more sophisticated techniques of operant conditioning to "reshape" the juvenile. In general terms, the process of juvenile adjudication, as well as coercively maintaining residence in a delinquency institution, is a *de facto* punitive measure. It is meant to be on the theory that transgressions should not be rewarded. It is precisely in this area that confusion reigns, since the path is then open to utilizing punitive measures as treatment. Attempts to distinguish penal from treatment approaches then break down.[86]

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inferences. According to a distinguished scholar of animal behavior: "[l]ittle can be gained by extrapolation from one species to the next . . . [therefore] evolutionary and comparative studies of behavior are of limited value if one wishes to gain an understanding of the origins, functions, or mechanisms of behavior." Klopfer, *Does Behavior Evolve?*, 223 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 113, 116-17 (1973). Similarly, Krushinskii makes an observation inconsistent with the entire thrust of Singer's generalization from caged laboratory rats to man: "[I]n the process of the evolution of higher nervous activity, reasoning ability has been more fundamentally changed than any other behavior. Its great and perhaps even leading role in the evolution of hominid behavior can hardly be questioned." Krushinskii, *Problems of Comparative Psychology*, 223 ANNALS OF THE N.Y. ACADEMY OF SCIENCES 77-81 (1973). This writer finds it hard to credit Singer's scientific neutrality when he strains to infer from rat data that punishment-therapy is effective, while he virtually ignores whole libraries-full of reports on the failure of incarceration and other punishments and punishment-therapies to rehabilitate offenders. *Cf.* Korn, *Of Crime, Criminal Justice and Corrections*, 6 U. SAN FRANCISCO L. REV. 27 (1971); Salem & Bowers, *Severity of Formal Sanctions as a Deterrent to Deviant Behavior*, 5 L. & SOC'Y REV. 21 (1970).

[85]Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974); Wexler, *Token and Taboo: Behavior Modification, Token Economies, and the Law*, 61 CALIF. L. REV. 81 (1973). Wexler's article deals only with behavior modification, including some non-punitive forms; Shapiro covers the gamut of coercive, organic, punitive, and violent therapies. Both Wexler and Shapiro come close to the concept of therapy-as-punishment which is developed in this article, but neither states it explicitly. Shapiro's excellent article was published after the bulk of research and writing for this article had been completed; otherwise it would have been cited more frequently. *See also* CONDITIONING, *supra* note 1.

[86]Malmquist, *Juvenile Detention: Right and Adequacy of Treatment Issues*, 7 L. & SOC'Y REV. 159, 180 (1972); *cf.* Schwitzgebel, *Limitations on the Coercive Treatment of Offenders*, 8 CRIM. L. REV. 267, 282-87, 299, 305, 319 (1972).

In our view "[a]ttempts to distinguish penal from treatment approaches then break down" because *the distinction lacked meaning from the beginning*;[87] it was never more than a difference in semantic perspective, like the distinction between a half-full and a half-empty glass of water. If we belabor the point that punitive therapies are in every sense punishments, just as they are also truly therapies, it is because so many others have for so long failed to see the point. These others include judges,[88] legislators,[89] psychiatrists,[90] and prison administrators.[91]

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[87]Occasionally psychiatrists make the identity of punishment and treatment explicit:

> This study concerns an evaluation of the use of faradic shock as *punishment* . . . . The uniqueness of the study lies in . . . c) the fact that this procedure was administered against the expressed will of the patient. . . .
>
> Three factors contributed to our choice of a *punishment treatment* paradigm . . . .

Ludwig, Marx, Hill, & Browning, *supra* note 1, at 625-26 (emphasis added). The "punishment treatment paradigm" meant, specifically, controlling a female patient by "aversive stimuli" (shocks) from an electric cattle prod. The authors justified their action on the grounds that the patient was "dangerous," that other treatments had failed, and that the electric cattle prod was a less drastic treatment than the others they considered: prefrontal lobotomy, shackling, and solitary confinement. *Id.*

[88]*See, e.g.*, Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968); *In re* Owens, No. 70J 21520 (Cook County, Ill., Cir. Ct., County Dep't, Juv. Div., July 9, 1971). In *In re Owens* the court prohibited injection of Thorazine and other tranquilizing drugs for punishment or control of juveniles, but permitted such injections "as part of a treatment for medical or emotional illness or disorder." Shapiro, *supra* note 85, at 245 n.10, *quoting from In re* Owens. Such a loophole will accommodate many a therapeutic-punitive Thorazine needle.

[89]*See, e.g.*, McDonough v. State, 253 Md. 547, 253 A.2d 517 (1969) (holding that Maryland's "defective delinquency" commitment statute, MD. ANN. CODE art. 31B, ¶ 1-4 (1957), is civil, not criminal; *i.e.*, therapeutic, not punitive, since the legislature so defined it); Blann v. Director of Patuxent Institution, 235 Md. 661, 202 A.2d 722 (1964), *cert. denied*, 380 U.S. 955 (1965). *See also* CAL. WELF. & INST'NS CODE ¶ 7200 (Deering Supp. 1968) (Atascadero State Hospital). For similar laws in other states and analyses of the therapy-as-punishment institutions they have spawned, see Morris, *supra* note 21, at 116-17.

[90]*See* authorities cited notes 1, 2, 5, 7, 13, and 55 through 67 *supra.*

[91]*Cf., e.g.*, the letter from R. Procunier, Director of the California Department of Corrections, to R. Lawson, Executive Officer, California Council on Criminal Justice, Sept. 8, 1971, *reprinted in* ROUGH TIMES 204 (Agel ed. 1973), declaring intent to seek funds for

> surgical and diagnostic procedures . . . to locate centers in the brain which may have been previously damaged and which could serve as the focus for episodes of violent behavior. If these areas were located and it was verified that they were indeed the source of aggressive behavior, neurosurgery would be performed . . . .

The prisoners to receive this psychosurgical treatment-punishment were to be selected from among those held in disciplinary segregation in the Adjustment Centers. *See* Shapiro, *supra* note 85, at 248-49.

### C. *Why a Difference that is Not a Difference Makes a Difference*

Judges, legislators, psychiatrists, and prison administrators have good reasons to refuse stoutly to recognize the indivisible identity of punishment and therapy in punishment-as-therapy. *Cui bono*? Who profits by it?[92] The answer is: drawing a distinction between treatment and punishment has advantages for everyone concerned except the public and the prisoner-patient-victim. Prison administrators, supervisors, and guards benefit, for fixing the labels "treatment" and "therapy" on punishments permits the use of procedures up to and including torture,[93] procedures which their own administrative regulations, the courts, and the public would not permit if the justification were merely punishment. Prison physicians, and psychologists if they are also involved, benefit, for their budgets, their numbers, and their powers are expanded. In addition they are enabled to believe that they are really "doing something."[94] Judges benefit, for it lets them avoid facing distasteful issues of cruel and unusual punishment carried out by their social peers and associates in the penal system. Men are powerfully motivated to avert their eyes from repugnant realities, especially realities for whose existence they share the responsibility.[95] The public receives a near-term benefit of the same sort as judges, but in the long run the public bears the brunt of violence stemming from pent-up bitterness engendered by cruel and unusual and excessive and disproportionate punishment-treatment. The court warned of this long-run cost in its condemnation of the Adjustment Center (theoretically a treatment facility) at the

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[92]SZASZ, *supra* note 1, at 143.

[93]See note 53 *supra*.

[94]One should not lightly dismiss the strength of the need to "do something." Consider one psychiatrist's recollection of his arrival at the U.S. Penitentiary at Marion, Illinois:

> My initial reaction . . . was to ask those more "knowledgeable" what it was I was expected to do. This was greeted alternitively [*sic*] either grimly or humorously and, in general at the institution, I found little but the feeling I was at best expected not to be a nuisance. . . . I found that the so called "experts" in the field shared with my bewildered, depressed compatriots the feeling that psychiatry ought to have a great deal to offer corrections but that no one had the vaguest idea how. . . . Facing the prospect of what would amount to serving a two-year sentence myself, I decided to attempt to do my best and proceeded to plan and implement my ideas.

M. Groder, Asklepieion—An Effective Treatment Method for Incarcerated Character Disorders 19-20 (mimeographed, undated paper, Federal Center for Correctional Research, Butner, N.C.).

[95]The desire not to see and not to think about evil, especially when one shares responsibility, is of course not limited to judges. Opton, *It Never Happened and Besides They Deserved It,* in SANCTIONS FOR EVIL 49 (Sanford & Comstock eds. 1971); Kostler, *The Nightmare That is a Reality*, N.Y. Times, Jan. 9, 1944, § 6 (Magazine) at 5.

California Correctional Training Facility[96] at Soledad. "[T]he type of confinement depicted in the foregoing summary of the inmates' testimony results in a slow-burning fire of resentment on the part of the inmates until it finally explodes in open revolt, coupled with their violent and bizarre conduct."[97] Another court remarked of the Clinton State Prison at Dannemora, N.Y. (which is also a psychiatric treatment facility): "[t]he subhuman conditions alleged by Wright to exist in the "strip cell" at Dannemora could only serve to destroy completely the spirit and undermine the sanity of the prisoner."[98] Destruction of the prisoner's "spirit" and breaking of his "will" have long been a prime means of keeping order in prisons;[99] the problem for the public is that people whose self-esteem ("spirit") has been destroyed and whose will has been broken cannot readily earn a living and make a place for themselves in the outside world to which nearly all[100] eventually return. Condemned by their prison-created disability to be outsiders to society, they become a danger to society:

> I don't justify stealing, even though I am a thief myself. But now I don't think I will be a thief when I am released. No, I'm not rehabilitated. It's just that I no longer think of becoming wealthy by stealing. I now only think of "killing." Killing those who have beaten me and treated

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[96]Note that in addition to the special treatment-by-punishment rationale of the Adjustment Center, a euphemistic shroud of therapeutic language has been drawn around the entire prison at Soledad; it is no longer a prison, but a "Correctional Training Facility." New York has gone about as far as it can go in this direction, totally abolishing both prisons and guards. Instead it now has "correctional facilities" and "correctional officers."

[97]Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[98]*Quoted in* Rubin, *The Burger Court and the Penal System*, 8 CRIM. L. BULL. 31, 35 (1972).

[99]*See, e.g.*, the interview with the Warden of Auburn Prison, *reported in* G. BEAUMONT & A. DE TOCQUEVILLE, ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATIONS IN FRANCE (1833) (reprint 1964). In the same vein the Society for Preventing Pauperism in New York wrote in 1822: "[Felons'] minds should be broken on the rack and wheel, instead of their bodies, and [felons] can only have their obstinate and guilty principles crushed and destroyed by severe treatment . . . ." F. GRAY, PRISON DISCIPLINE IN AMERICA 37 (1847), *quoted in* Schwitzgebel, *supra* note 86, at 269-70. For a social scientist's empirical observations tending to show that "breaking the will" is *inevitable* in a prison situation, see Zimbardo, *The Psychological Power and Pathology of Imprisonment*, in *Hearings on Corrections, Part II: Prisons, Prison Reform, and Prisoners' Rights: California Before Subcomm. No. 3 of the House Comm. on the Judiciary*, 92nd Cong., 1st Sess., at 152 (1971) [hereinafter cited as *Hearings on Corrections*]. For a frank exposition of the rationale and methods for "breaking the spirit" by cruelty, see F. DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS, WRITTEN BY HIMSELF (1962). Douglass tells how his owner, wanting a more obedient slave, lent him on a one-year contract to Mr. Covey, a man who specialized in "breaking" Negroes by severe bearings.

[100]Ninety-eight percent, according to Korn, *supra* note 84, at 161-65.

> me as if I were a dog. I hope and pray for the sake of my own soul and future life of freedom, that I am able to overcome the bitterness and hatred which eats daily at my soul . . . .[101]

From such men as the one quoted above, and for such state-raised, punitively-treated children as Charles Manson, Richard Speck, and Lee Harvey Oswald, the public suffers both the danger of their presence among us and the expense of locking them away. From the perspective of behavioristic theory, it is unfortunate that the "negative reinforcement" we receive from them does not produce an "association" in our minds between what we have done to them and what they, enraged, return to us.

## II. PSYCHIATRISTS' ROLES IN VIOLENT PUNISHMENT-AS-THERAPY

Courts have traditionally been most reluctant to entertain complaints of prisoner mistreatment, fearing to undermine the authority of prison officials.[102] The courts have been doubly reluctant to involve themselves in claims of medical mistreatment in prisons,[103] for judges, like the rest of us, tend to assume that a physician aims to help his patients. But *non nocere,* do not harm, the Hippocratic Oath enjoins; and the fact that it is necessary to have such an injunction should be a caution that physicians, like the rest of us, have other motives. "Other motives" are especially significant for psychiatrists in prisons, for an examination of the record of psychiatric treatment in prisons will show that prison psychiatrists are, in general, first and foremost functionaries in the disciplinary power structure of the prison bureaucracy. Their interests are as adverse to the welfare of the prisoners as are those of the prison keepers. Therefore, *punitive psychiatric therapies in prisons should be subject to at least the same judicial scrutiny and standards as are administrative punishments.* While restrictions on punishment are extremely lax,[104] they allow far less latitude than is currently abused

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[101]Letter from a prisoner subjected to 37 months in solitary confinement, *quoted in* Zimbardo, *supra* note 99, at 153. *See also* T. GADDIS & J. LONG, KILLER: A JOURNAL OF MURDER (1970).

[102]Comment, *Constitutional Limitations of Prisoners' Right to Medical Treatment,* 44 MISS. L.J. 525 n.1 (1973).

[103]*Id.* at 525-28.

[104]"The Eighth Amendment to the United States Constitution forbids the infliction of cruel and unusual punishment. Astonishing as it may seem, not a single kind of physical punishment has ever been condemned by the Supreme Court of the United States, nor does any kind of punishment stand condemned." Rubin, *The Burger Court and the Penal System,* 8 CRIM. L. BULL. 31, 33 (1972). Of course, the Court has since declared capital punishment to be "cruel and unusual" and hence unconstitutional, at least if the jury has discretion to impose it or not. Furman v. Georgia, 408 U.S. 238 (1972).

under the theory that therapy-as-punishment is treatment and therefore is not punishment. If psychiatrists' activities in prisons were constrained by the same *minimal* requirements of due process and prohibitions against cruel and unusual punishments as now apply to prison wardens and prison guards, the practical effects would be substantial, especially so with respect to indeterminate sentences.

To substantiate the above assertions, it will be necessary to examine the social roles and bureaucratic matrices in which prison psychiatrists move as they mete out therapy-as-punishment.

### A. *The Psychiatrist as Proponent of Violence Against Prisoners: The Legitimator of Therapy-by-Punishment.*

Visotsky[105] has summarized the findings of many investigators[106] showing that in mental institutions the bureaucratic needs of the institution for passivity, obedience and submission take precedence over the therapeutic needs of the patients for development of autonomy, initiative, and self-control. Nevertheless, the therapy-as-punishment "armamentarium" of psychiatry is pressed into service for the institution's anti-therapeutic purposes: "Obedience to aides and conformity to the culture of the hospital was rewarded; deviance was punished through the denial of privileges and through more active sanctions such as physical punishment, physical restraint, electroshock, hydrotherapy, and transfer to less desirable areas of the hospital."[107]

The psychiatrist as proponent of violence against inmates, patients or prisoners, for the purpose of furthering institutional goals will be found in many hospitals and prisons.[108] An especially clear example is offered by Cotter, a California psychiatrist who described the innovations he introduced during 2 months of volunteer work in South Vietnam in 1966. In the section of his paper titled "Operant Conditioning Applied to Chronic Patients," he reports his efforts to bring the moral benefits of the Puritan work ethic to the "backwards" of a Southeast Asian hospital. Telling the patients that they would have to work if they expected to be discharged, he was met by a majority response of "'Work! Do you think we're crazy?'"[109] Dr. Cotter responded by announcing:

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[105]Visotsky, *Adequacy of Treatment and Provisions for Methods of Assuring Adequacy of Treatment,* in THE MENTALLY ILL AND THE RIGHT TO TREATMENT 63 (Morris ed. 1970).

[106]H. DUNHAM & S. WEINBERG, THE CULTURE OF THE STATE MENTAL HOSPITAL (1960); E. GOFFMAN, ASYLUMS (1961); A. STANTON & M. SCHWARTZ, THE MENTAL HOSPITAL (1954); Lehrman, *Do Our Hospitals Help Make Acute Schizophrenia Chronic*?, 22 DISEASES OF THE NERVOUS SYSTEM 489 (1961).

[107]Visotsky, *supra* note 105, at 66.

[108]SZASZ, *supra* note 1, at ____.

[109]Cotter, *Operant Conditioning in a Vietnamese Mental Hospital,* in CONTROL, *supra* note 55, at 100-01.

> People who are too sick to work need treatment. Treatment starts tomorrow—electroconvulsive treatment. . . .
>
> The next day we gave 120 unmodified[110] electroconvulsive treatments . . . .[111]

Therapy-as-punishment in the form of electroconvulsive shock evidently did not work as well as Cotter had hoped, for soon he and two other psychiatrists were "kept quite busy administering the several thousands [sic!] of shock treatments required . . . ."[112] He therefore announced, "After this, if you don't work, you don't eat."[113] The threat of total starvation (the patients were already malnourished) drove most patients to the fields. Having "cured" the patients, Cotter looked for community placements, and, learning that the local prison officer would not permit prisoners of war to be used for forced labor in U.S. Special Forces camps in the mountains, Dr. Cotter volunteered the services of "his" mental patients. This he considered therapy, although there are those who would contend that sending schizophrenics to work as corvée laborers for American soldiers in the most isolated and vulnerable outposts in Vietnam could have an inimical effect on their health.

The significance of the Cotter article is not that one psychiatrist so ingenuously reported on his use of violence—electric shock and starvation—to force mental patients to work. That is revealing only about the individual. The significance lies, rather, in what is revealed about professional standards by the fact that the psychiatrist's work resulted not in censure or sanctions, but in publication of his article in the official journal of his professional association[114] and reprinting in a textbook[115] whose purpose is to illustrate "progress"[116] in behavior control and to "begin suggesting new tactics for the prevention of behavior problems."[117] Such violent tactics are not new at all, of course; only the obfuscating use of the technical vocabulary of operant conditioning and behavior modification is novel. Torture as a weapon of control and punishment has a long history. Its persistence testifies to its effectiveness. Because it is so very useful, prison officials are loath to renounce it.[118]

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[110]By "unmodified" Dr. Cotter means that he administered the electric shock to fully conscious men and women. It is customary to give a general anesthetic prior to electroconvulsive shock therapy in order to alleviate the terror of the experience.

[111] Cotter, *supra* note 109, at 101.

[112]*Id.* at 103.

[113]*Id.* at 102.

[114]Cotter, *Operant Conditioning in a Vietnamese Mental Hospital,* 124 AM. J. PSYCHIATRY 23 (1967).

[115]CONTROL, *supra* note 55, at 100.

[116]*Id.* at Preface [unnumbered page].

[117]*Id.* at Introduction [unnumbered page].

[118]At the 101st Congress of the American Correctional Association, 1971, Tom Murton,

Small wonder, then, that as courts begin to implement the constitutional prohibition against torture,[119] the practice should reappear under other names, and officials begin seeking other sanctioning agents to legitimate a valued weapon.

A prime example of psychiatric violence against prisoners as a means of legitimating cruel and unusual punishment is "aversion therapy" as imposed on inmates. The medical technique has been described in detail elsewhere,[120] so a layman's description may be more appropriate here:

> [Harvey has just refused his nightly Thorazine "cocktail."]
> "That's it, Harvey," Harrison says. "Remember what I told you

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formerly head of the Arkansas prison system, introduced a resolution "to reject in principle the 'unwarranted use of force in controlling inmates, which often results in their death.'" The resolution was defeated by voice vote. J. MITFORD, *supra* note 48, at 44. *See also* Clanon's defense of Anectine therapy-by-punishment, Clanon, *Letter to the Editor*, 1 BULL. OF THE AM. ACAD. OF PSYCHIATRY AND THE L. 61, 68 (1972). *See generally* Greenberg & Stender, *The Prison as a Lawless Agency*, 21 BUFFALO L. REV. 799 (1972); Ingraham, *Will Legal Relief for Inmates Prevent Violence in Correctional Institutions?*, PREVENTION OF VIOLENCE IN CORRECTIONAL INSTITUTIONS 33 (National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice, 1973). Ingraham, an academic criminologist who advocates implantation of telemetry devices in the brains of parolees so that they may be controlled by radio via a central police computer, deplores recent lower court decisions permitting prisoners to air their grievances with respect to punishment in the courts; he advocates leaving the implementation of "whatever reforms and changes" legislatures may decree to "trained administrators with expertise in the field." *Id.* at 46. In his opinion, "introducing adversariness and legal game-playing into the prison regime may do more to stimulate violence in prisons than to suppress it." *Id.* at 43. For a candid exposition of the rationale for torture, and for its political equivalent, terror, one may turn to the Germans. H. HIMMLER, DIE SCHUTZSTAFFEL ALS ANTIBLOSCHEWISTISCHE KAMPFORGANISATION [The Black Corps as an Anti-Communist Fighting Organization] (1936). The theory of terror was not a Nazi discovery. Almost one hundred years ago General Hartman, elaborating on Bismarck's *Fuerstenpolitik*, stated: "whenever war breaks out, terrorism becomes a necessary military principle," since "terrorism is a relatively gentle means of keeping the masses in a state of permanent obedience." HARTMAN, MILITAERISCHE NOTWENDIGKEIT AND HUMANITAET [Humanity and Military Necessity], DEUTSCHE RUNDSCHAU, 1877-1878, XIII-XIV, *cited in* GERMAN PSYCHOLOGICAL WARFARE; SURVEY AND BIBLIOGRAPHY (New York, Committee for National Morale, 1941, on deposit in the Maslow Library of the Wright Institute). Prison administrators are unlikely to be as frank as Himmler and Hartman, but for keeping "the masses" of prisoners "in a state of permanent obedience," there are probably no easier methods than terror and torture. This is essentially the same argument as is made by Ball in his defense of aversion herapy (note 65 *supra*) and by Cahoon in his defense of such procedures (note 63 *supra*). The titles of their articles alone indicate the line of reasoning: the end justifies the means.

[119]Weems v. United States, 217 U.S. 349 (1910), is often cited as the leading case on this point; however, "this decision, applicable in a foreign land, considering a foreign law, has never been applied by the [U.S. Supreme] Court to strike down equal and worse abuse of prisoners in this country." Rubin, *supra* note 104, at 33.

[120]See authorities cited note 1 *supra*.

> last time. They're just going to have to give you Anectine again."
>
> Harvey goes limp. "No Mr. Harrison, don't give me that!"
>
> "I'm sorry, Harv, but you don't give us much choice."
>
> . . . Burns prepares a Thorazine injection . . . [a]nd one morning soon they will take Harvey downstairs to an examining room, and strap him to the table. The doctors will drain Anectine from a vial while technicians wheel an oxygen tank closer. They will tell Harvey if he had behaved himself they wouldn't have to do this. The cotton ball will be cold on the tied vein, the needle inserted before he has time for a full breath or thought. Paralysis will sweep through him, pounding heart stilled, lungs unable to draw or burst, attempts at movements aborted. He will know he is dead as the doctor bends to softly warn, "Now, Harvey, you won't act up anymore, will you? It just doesn't pay. You know better than that . . . ." And before unconsciousness, before a blurred hand reaches for the tank, he'll revive, tingling with frightened life, no wiser from knowing the next dose will be larger.[121]

Livingston's description of Anectine therapy-by-punishment is more vivid than technical descriptions, but it in no way distorts the role of the authorities; *i.e.*, telling the prisoner-patient that he is receiving the therapy-punishment because he has refused to obey orders, in this instance orders to take a less severe punitive therapy, the drug Thorazine.[122] Nor does Livingston's description misrepresent the effect of

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[121]G. LIVINGSTON, EXILE'S END 101-02 (1973). The author was a patient-prisoner at Atascadero State Hospital, California.

[122]A journalist recently noted:

> The psychiatrist's main function is to prescribe medication that will drug the inmate into submissiveness . . . .
>
> . . . .
>
> A sure way to quiet down a man who is "acting out" is to put him on 1,100 milligrams of Thorazine a day. It turns him into a zombie. Or, in clinical terms, it screens off the amount of input so the inmate can reorganize his psychic structure. . . .
>
> . . . .
>
> [M]ost of the men on the 10th floor [of the jail] are on daily doses of Thorazine varying from 200 to 1,400 milligrams. Another common medication is chloral hydrate, the original knockout drops Irish bartenders used to slip into Mickey Finns. . . .
>
> . . . .
>
> One measure of prison reform is that the psychiatrist has become the successor of the brutal guard. Both men work toward the same goal: to produce a model prisoner, quiet and passive, who answers when he is spoken to and does what he is told. Where the brutal guard used rubber hoses, the psychiatrist relies on powerful tranquilizers like Thorazine. . . .
>
> . . . .
>
> Mistreatment of prisoners has not vanished from the Tombs; it has simply moved to the 10th [psychiatric] floor. . . .

Morgan, *Entombed*, N.Y. Times, Feb. 17, 1974, § 6 (Magazine) at 14, 21-22, 24.

Anectine. The drug is used, according to psychiatrists who use it, *because* it produces terror, the sensation of drowning, of dying.

Other important "aversive stimuli" include electric shock to the arms, feet, or groin[123] and drugs which produce 15 minutes to 1 hour of uncontrollable vomiting. These heroic treatment-punishments are rationalized as necessary and humane therapy in view of the seriousness of the mental disorder and the desire to avoid even more drastic alternative treatments,[124] but the realities are spelled out in Judge Ross's opinion on the use of amorphine as an aversive stimulus to produce vomiting:

> Dr. Loeffelholz [a prison psychiatrist] testifed that the drug could be injected for such pieces of behavior as not getting up, for giving cigarettes against orders, for talking, for swearing, or for lying. Other inmates or members of the staff would report on these violations of protocol and the injection would be given by the nurse without the nurse or any doctor having personally observed the violation and without specific authorization of the doctor.[125]

The United States Court of Appeals for the Eighth Circuit declared this procedure to be cruel and unusual punishment, but only after the trial court found no constitutional objection to this torture of prisoner-patients for minor infractions, including infractions alleged only by fellow prisoners and not witnessed by staff. The trial court[126] even rejected the recommendation of its magistrate that inmate aides not be used in carrying out the "therapy."[127] The trial court's decision is indicative of the strength of the punishment-as-therapy idea: "Since—the argument runs—by definition the treatment is not 'punishment,' it obviously cannot be 'cruel and unusual punishment.' "[128] Except for the assistance of the punishment-as-therapy fallacy, it is hardly conceivable that the administration of powerful emetic drugs in the circumstances of *Knecht v. Gillman*[129] could have been approved by *any* court in a nation whose laws prohibit torture.

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[123]"*Behavior Mod" Behind the Walls*, TIME, March 11, 1974, at 74 (at Connecticut State Prison).

[124]*See* text accompanying notes 56 through 66 *supra*.

[125]Knecht v. Gillman, 488 F.2d 1136, 1137 (8th Cir. 1973).

[126]U.S. District Court for the Southern District of Iowa, William C. Stuart, Judge (not reported).

[127]Knecht v. Gillman, 488 F.2d 1136, 1136-37 (8th Cir. 1973).

[128]Vann v. Scott, 467 F.2d 1235, 1240 (7th Cir. 1972) (The appellate court cited this argument in order to reject it).

[129]488 F.2d 1136 (8th Cir. 1973). Aversion therapy as used outside of prisons and hospitals is not necessarily torture. Neurotics sometimes submit to aversion therapy in an effort to cast off their unwelcome compulsions and cravings. Since they are free citizens, they retain control over the treatment, deciding if and when to begin, whether to continue, and when to stop. Defenders of aversion therapy in prisons have often argued

Advocacy of violence against prisoners in the name of punishment-as-therapy has extended to promotion of Chinese-style thought reform ("brainwashing") for American prisoners. A prominent social psychologist, author of a definitive book[130] on Chinese thought reform, suggested to a meeting of Federal prison administrators which included Dr. James V. Bennett, then Chief of the Bureau of Prisons, that they could apply the Chinese methods in their institutions:

> [T]his [thought reform] "model" of behavior and attitude change is a general one which can encompass phenomena as widely separated as brainwashing and rehabilitation in a prison or a mental hospital. I would like to have you think of brainwashing not in terms of politics, ethics and morals, but in terms of the deliberate changing of behavior and attitudes by a group of men who have relatively complete control over the environment in which the captive population lives.
>
> If we find similar methods being used by the Communists and by some of our own institutions of change, we have a dilemma, of course. Should we then condemn our own methods because they resemble brainwashing? I prefer to think that the Communists have drawn on the same reservoir of human wisdom and knowledge as we have, but have applied this wisdom to achieve goals which we cannot condone. These same techniques in the service of different goals, however, may be quite acceptable to us.[131]

The first of these Asian methods which "may be quite acceptable to us" which the psychologist identifies as central to the thought reform of Chinese civilian prisoners is: "In trying to get him to confess, they would beat, kick, shout at, spit on, humiliate, revile and otherwise abuse the prisoner twenty-four hours a day for weeks and months on end."[132] The "they" here is the prisoner's cellmates, for the key to a favorable benefit-cost ratio in the Asian scheme is conservation of paid manpower by using the prisoner's cellmates as what the American psychologist terms the "agent of change." The necessary abusive behavior was exacted from the cellmates under the threat that any lack of enthusiasm on their part would show that they themselves were backsliding or insincere, and so in need of taking the receiving end of the physical and verbal violence. Moreover, the prisoners could not easily "con" one another:

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that, since the therapy is available to the general public, incarcerated persons should not be denied access to it. To this writer such arguments have as much force as the idea that, since some people choose to dose themselves with whiskey in order to dissolve their anxieties, it would be an inhumane denial of treatment not to force a bottle of whiskey down the throat of prisoners whose behavior has been diagnosed as "anxious."

[130]E. SCHEIN, COERCIVE PERSUASION (1961).

[131]Schein, *Man Against Man: Brainwashing,* 8 CORRECTIVE PSYCHIATRY & J. SOCIAL THERAPY 90 (1962).

[132]*Id.*

> False confessions or insincere attempts to comply with cellmate pressures were met with renewed hostility. Nothing less than real recognition of crimes was demanded. Periodic interrogation, general physical debilitation, sleeplessness and a very exacting prison regimen all added to the stresses . . . .[133]

The psychologist preceded his description of Chinese thought reform with his opinion that the means were legitimate; it was only the Communist ends of the Chinese that were unacceptable. The address to the prison administrators ends on the same note:

> And do we not put criminals with the wrong attitude in the midst of others with the right attitude in the hope that they will learn the right ones through the pressure of the group. Let me remind you, I am not drawing these parallels in order to condemn some of our own approaches, rather my aim is just the opposite. I am trying to show that Chinese methods are not so mysterious, not so different and not so awful, once we separate the awfulness of the Communist ideology and look simply at the methods of influence used.[134]

Asked during the discussion period whether his advice would apply to political prisoners such as conscientious objectors, the psychologist said that if they were troublemakers such methods would indeed be helpful.[135]

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[133] *Id.*

[134] *Id.*

[135] *Id.* Dr. Schein, in a letter to HARPER'S MAGAZINE, Nov. 1973, at 128, maintains that "[n]othing could be further from the truth" than the interpretation here placed on his remarks to the executive development seminar of the Bureau of Prisons in 1962. He writes:

> I had been asked to *describe* how the Chinese Communists managed their prison camps . . . .
>
> . . . .
>
> The notion that social scientists were in any way teaching prison wardens these new techniques is naive in the extreme. The fact is that any organization, when threatened by a small minority, will tend to defend itself, and prisons will do so, like any other organization. Wardens have learned from their own experience how to do this with very little help from professors. Professors have helped to describe and highlight these techniques . . . .
>
> . . . .
>
> Were I to give this talk again today, I would not simply describe what happened in Korea and how it does or does not resemble what we might do in our own prisons. I would find it necessary to evaluate these techniques and take a clear stand *against* their use as a technique of prison management.

Although the present writer is relieved to learn that a distinguished psychologist wishes to take a clear stand against use of Chinese-style thought reform methods in American prisons in 1973, he is unable to find any evidence that Dr. Schein took a merely neutral stand in 1962 ("I had been asked to *describe* . . . ."). The passages quoted in the text above this note are representative of the 1962 paper, and the writer has been unable to

It is a matter of controversy whether, and to what extent, Chinese thought reform methods are now being applied in American prisons. The Federal Prisoner's Coalition, in a petition to the United Nations Economic and Social Council, July 1972,[136] asserts that the Asklepieion program in the Marion, Illinois, Federal Penitentiary is indeed modeled on Chinese methods, and their point-by-point comparison between Dr. Schein's paper[137] and the Asklepieion program is plausible. Whether that plausible interpretation is correct or not remains to be seen. Certainly the Asklepieion program uses *some* elements of Chinese thought reform, but this does not necessarily condemn it as psychiatric violence. Schein is correct when he points out that Chinese thought reform has a great deal in common with traditional practices in Western institutions as diverse as hospitals, religious orders, schools, and prisons.[138] What the Federal Prisoners' Coalition claims is that Asklepieion goes beyond the usual commonalities to employ the violent, identity-destroying, and highly punitive aspects which Chinese thought reform does *not* share with standard Western practices. Of that allegation this writer, having seen little documentary evidence, remains skeptical. It may be significant, however, that in his statement defending the Asklepieion program before a Congressional Committee[139] the founder of the program made no attempt to refute the Prisoners' Coalition charges; instead he denied that he would use "methods of modern-day torture known as aversive conditioning, specifically the misuse of drugs, electric shock or psychosurgery."[140] None of these methods is used in Chinese-style thought

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locate any passages consistent with Dr. Schein's current belief. Moreover, Dr. Schein is too modest when he writes, "[t]he notion that social scientists were in any way teaching prison wardens these new techniques is naive . . . . Wardens have learned from their own experience how to do this with very little help from professors." American prison wardens have never systematically employed cellmates as agents for deliberate, continuous, prolonged physical and verbal abuse to break down other prisoners' personal identity, their concept of self, their "spirit." Nor have American prison wardens systematically attempted to force prisoners to demand confessions from one another, to attack those confessions as false and insincere, to demand of one another more self-critical, more self-destructive "true" confessions, and so forth. Because these key aspects of the Chinese methods did not exist in American prisons, the results of Chinese thought reform astounded and frightened Americans in the 1950's. In 1962 Dr. Schein was indeed teaching prison wardens something they had not already learned from their own experience. That such was the case is further indicated by the fact that, at the conclusion of Dr. Schein's 1962 seminar, Dr. Bennett urged the assembled prison executives to go forth and experiment with the methods Dr. Schein had suggested, an admonition that would have made no sense if Dr. Schein had merely described for them what they were already doing.

[136]J. MITFORD, *supra* note 48, at 123.

[137]Schein, *supra* note 131.

[138]E. SCHEIN, *supra* note 130, at 119-20.

[139]Groder, *supra* note 53.

[140]*Id.* at 8-9.

reform, and none was alleged in the prisoners' petition to the United Nations Economic and Social Council.

The nature of the Asklepieion program is of considerable practical significance. Dr. Groder, founder of Asklepieion and now Program Development Coordinator, Federal Bureau of Prisons, intends to employ it as one of the primary programs at the new Federal Center for Correctional Research, Butner, North Carolina. He also intends the program to export its "graduates" to found similar programs throughout the federal and state prison systems.[141] That process has already begun.

While the nature of the original Asklepieion program remains at issue, it appears that violent therapy-as-punishment could take place within its theoretical framework. Dr. Groder's written description of Asklepieion[142] makes it clear that the very ambitious aims of Chinese thought reform—to "unfreeze" the prisoner's former organization of beliefs about himself (*i.e.*, to degrade his self-concept, to shatter his personal identity), to "change" his personality, and to "refreeze" the new beliefs into his new personality[143]—are included in the Asklepieion program. To achieve such ambitious ends the Chinese required drastic and violent means; it is highly unlikely that Americans will succeed with less. Central features of Asklepieion, "transactional analysis," "Synanon games," "primal therapy," and "attack therapy" [*sic*] easily lend themselves to distortion into Chinese-style, violent verbal assaults by the group on the individual, and if restraints are loosened, to violent physical assaults as well. Given the exigencies of power relationships in American prisons, it is all but inevitable that the restraints will be loosened, the humane intentions of the founding psychiatrist notwithstanding. Indeed, this has already occurred in at least one program which is derivative of Asklepieion. A program was initiated in the summer of 1973 at the California Institution for Women which combined the rhetoric of both Asklepieion and behavior modification. Working within a framework of "therapeutic" language, the prison officials designed a program of extraordinary deprivation and severity. In keeping with the therapy-as-punishment orientation, no attention was given to constitutional issues. Shortly after the program began, in the course of an all-night "marathon" session of "attack therapy" for the purpose of pressuring a politically radical prisoner to submit to the program, the nonconforming prisoner was held on the floor by a guard while another prisoner beat her, fracturing several facial bones.[144] The progression just

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[141]*Id.* at 8; Groder, *supra* note 94, at 25, 39.

[142]Groder, *supra* note 94.

[143]*Id.* at 5-15, 25-31.

[144]Information on events at the California Institution for Women was obtained: (1) from letters from prisoners, (2) from Fay Stender, former Director of the Prison Law

described, from drastic but humanely-intended conceptualization to a brutal realization, is a progression that has been seen before in efforts toward therapeutic prisons. It will surely be seen again.

### *B. The Psychiatrist as Compliant Accomplice, Näive Dupe, and Pressured Subordinate in Violence Against Prisoners: Therapy-by-Punishment as a Façade*

Psychiatrists are not the proponents of all the violent assaults on prisoners undertaken using their psychiatric tools or psychiatric language. Often prison psychiatrists complacently issue the necessary orders, allowing higher administrators to use their authority in the service of punitive purposes. When they participate in such façades, they take the role of *compliant accomplices.* At other times psychiatrists in prisons fail to see the plainly visible punitive use to which they are being put; they are then *näive dupes.* Others go along with punitive misuse of their authority reluctantly, but cannot bring themselves to complain, resign, or be fired; they take the common bureaucratic role of *pressured subordinates.* Since these roles meld into one another, and since individuals often move from one role to another, the three roles will be illustrated together.

#### 1. The Hole as Therapy: From Adjustment Center to START

As long as there have been prisons there have been "holes." Guards hold only an insecure authority over masses of prisoners unless they can threaten drastic punishment for insubordination. The hole is such a weapon. Not only does the threat of the hole intimidate men into docility, it is also a convenient place in which to wall off and to *break the will* of any who are not intimidated, especially any who show signs of political, organizational, or leadership ability.[145] Such men, who might gather a group of their peers together in common purpose, are perceived

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Project, after her visit to the prison in late 1973, (3) from internal prison documents describing the ITU program, and (4) from correspondence between the prison Superintendent and the attorney for the injured prisoner.

[145]"[Prison] spokesmen strenuously deny that they use lock-up in the Adjustment Center as punishment for political dissidents . . . . But . . . as reported in the confidential minutes of the wardens and superintendents meeting, October 11-12, 1972, under the topic 'Inmate Alliances,' Director Raymond Procunier 'asked the problem be kept in perspective, comparing it to the Muslim situation ten years ago. The director suggested the leaders of the various groups be . . . locked up.'" J. MITFORD, *supra* note 48, at 133. *See also* Hollander, *The "Adjustment Center": California's Prisons Within Prisons,* in *Hearings on Corrections, supra* note 99, at 285. The hole and other forms of graded punishment housing within the institution are not limited to the United States nor to prisons; they are generally features of total institutions. For examples from American mental hospitals, *see* E. GOFFMAN, ASYLUMS (1961); for examples from prisons in the U.S.S.R., *see* A. MARCHENKO, MY TESTIMONY (1969).

as the greatest threat of all by those who operate the totalitarian form of internal government which is prescribed for prisons.[146] Thus it was natural that when physicians and social scientists came into prison administration they re-invented the hole. One such social scientist describes how he attempted "to wrest control of the prison . . . from a coalition of prisoners:"[147]

> [We built] . . . a more secure "prison within the prison" for "persistently recalcitrant or dangerous inmates." I spent considerable time in this prototype of the modern "adjustment center . . . ."
>
> The result of this thought was the production of a *Manual for the Treatment of Adaptive Offenders* . . . for overcoming the resistance of recalcitrant inmates to treatment. The effort proceeds through several stages . . . :
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> Stage I: The Struggle for Control ("Can I Dominate You?")
> Stage II: Overt Rebellion ("Can You Stop Me?")
> Stage III: Heroic Suffering ("You Can't Break Me!")
> Stage IV: Despair ("Does Anybody Give a Damn?")
> Stage V: Emergence of Self-Doubt ("This Is Getting Me Nowhere.")
> Stage VI: Testing ("Can I Make It?")
> Stage VII: Fixating the Therapeutic Results and Terminating Institutional Treatment.
>
> . . . I had tacitly accepted a technique for breaking the resistance of my clients . . . I was collaborating in a process of torture which used isolation and frustration as its weapons . . . .[148]

Here one sees the language of psychiatry—"adaptive," "treatment," "self-doubt," "testing," "therapeutic results"—used to legitimize a process which in plain English is called "throwing them in the hole until they break."

Throwing men in the hole was not the intention of the treatment-minded men who invented therapeutic segregation. In California such

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[146]M. Camacho, President of the California Correctional Officers Association has stated:

> [T]he California Correctional Officers Association cites the revolutionary movement, the existing conspiracy to destroy our system, as the prime cause of increased prison violence and murder. To reverse this trend, we recommend housing revolutionary inmates in a separate maximum security facility. We do not see this as the ultimate solution . . . . [O]ur recommendation that revolutionary inmates be housed apart from the conforming inmates is based on arriving at the fastest, not necessarily the ultimate, solution. . . .

*Hearings on Corrections, supra* note 99, at 58, 142. Camacho probably did not intend to invoke connotations of the Third Reich by use of the phrase "ultimate solution."

[147]Korn, *supra* note 84, at 31.

[148]*Id.* at 32. Note that the aim is not just law-abiding behavior, but to break the will. *Cf.* note 99 *supra* and text accompanying note 170 *infra*.

cellblocks are called Adjustment Centers; and three high prison officials described their intention thus:

> The term Adjustment Center . . . describe[s] a facility with positive and constructive treatment objectives, a place which is quite the opposite of what in ordinary prison usage is designated usually by some negative and forbidding titles such as "The Hole". . . . The experiences in the Adjustment Center are planned for treatment rather than punishment.[149]

Of course no "positive and constructive" treatments ever occurred in Adjustment Centers.[150] So foul are conditions in Adjustment Center cells and so intense the harassment and brutality[151] that shocked judges have from time to time condemned the Adjustment Center as cruel and unusual punishment.[152] The cruelty was inevitable, for: "[t]he worse the Adjustment Center . . . the more effective it is as a weapon, bludgeoning the convicts into passivity, docility, and submissiveness."[153]

When the idea of positive and constructive treatment was corrupted, most of the specialists in psychiatric treatment who had conceived and promoted the Adjustment Centers participated in the psychiatric legitimation of consigning prisoners there. As one psychiatrist who worked briefly at San Quentin has noted: "[O]nly those psychia-

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[149]Cook, Fenton, & Heinze, paper given at the Congress of the American Correctional Association, 1955, *quoted in* J. MITFORD, *supra* note 48, at 106.

[150]"The Department of Corrections not only stumbled in achieving their [therapeutic] objective, but fell flat on their face . . . . As stated by Dr. David A. Ward, 'Segregation and isolation units (the "hole") were merely relabeled "adjustment centers" . . . .'" ASSEMBLY SELECT COMMITTEE ON PRISON REFORM AND REHABILITATION, ADMINISTRATIVE SEGREGATION IN CALIFORNIA'S PRISONS; ALIAS: THE HOLE, LOCKUP, SOLITARY CONFINEMENT AND THE ADJUSTMENT CENTER 2-3 (1973) (citations omitted) [hereinafter cited as SEGREGATION]. The complete lack of any program which could be called therapeutic, even by the farthest stretch of the imagination, did not stop administrators from continuing to invoke psychiatric sanction. A recent document states that the Adjustment Centers provide:

> a) A positive, treatment-oriented atmosphere wherein the individual inmate can come to grips with his personality problem.
>
> b) An optimum amount of individual and group counseling, individual and group psychotherapy . . . .
>
> c) specialized psychiatric, psychological and social work services.

CALIFORNIA DEPARTMENT OF CORRECTIONS, DIRECTOR'S RULES ch. V, CL/83 (Feb. 5, 1970). The prison administration does not consider these fantasies to be mere boilerplate, for as recently as 1972, in a letter to a legislator, the Director of the Department stated that lockup in the Adjustment Centers is not intended as a punitive measure. Letter from R.K. Procunier to W. Karabian, Sept. 14, 1972, *described in* SEGREGATION, *supra*, at 4.

[151]*See Hearings on Corrections*, *supra* note 99, at 249-88.

[152]*E.g.*, Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

[153]Hollander, *supra* note 145, at 286.

trists who become co-opted by the prison and adopt Custody's punitive attitude to the prisoner are likely to remain on the job: 'Those who do not fit in will be eliminated and those who do fit in will stay on.' "[154] This describes the *compliant accomplice* role. Others may have been *näive dupes,* averting their eyes, ears, and noses from the evidence that would have refuted the official myth of therapeutic justification for the Adjustment Centers. No doubt many psychiatrists were *pressured subordinates,* realizing that administrators and guards were perpetrating the monstrous cruelties in the name of therapy, but doing nothing to resist.

*The Escalation of Punishment.* The failure of California's Adjustment Centers and of their equivalents elsewhere is widely recognized. Not only have they failed to provide treatment, but more important, they have failed to break the spirit of prison militants.[155] Korn explains why:

> *The Escalation Process: In Order to Remain Effective, Punishments Must Continually Become More Severe*
>
> [T]he essential rationale of a punitive system [is]: deterrence through the fear of *worse* rather than the hope of better.
>
> But the theory fails to take into account man's capacity to adapt.
>
> . . . .
>
> It is the adaptation process which ultimately defeats any punishment short of extreme physical torture and, of course, death. Because the increased dosages of suffering also increase the victim's tolerance, the level must be continually raised.[156]

In the current process of escalating punishment psychiatry is once again centrally involved. In California the escalation is termed the Maximum Psychiatric Diagnostic Unit.[157] A similar program in New York, aborted after public protests, was titled the "Prescription Program." Its espousal of a therapeutic operant conditioning rationale did not impress the New York Select Committee on Correctional Institutions and Programs:

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[154]Powelson & Bendix, *Psychiatry in Prison,* 14 PSYCHIATRY 73 (1951), *cited in* J. MITFORD, *supra* note 48, at 101.

[155]*See* note 99 *supra.*

[156]Korn, *supra* note 84, at 58-59.

[157]This writer attended a planning meeting for the Maximum Psychiatric Diagnostic Unit in 1971, just before it opened. Prison psychiatrists and administrators had at that time planned only two programs for the unit, chemical castration using the drug cyproterone acetate, and psychosurgery. When these plans leaked out, public reaction was adverse. The plans for these experimental forms of psychiatric punishment-as-therapy were shelved, and the new unit appears headed toward the status of just another Adjustment Center. SEGREGATION, *supra* note 150, at 4. If so, this particular escalation will have been arrested.

> Some of the committee's members have reservations about the plans for the "Prescription Program" (euphemistically termed by the Department the "Rx" Program) on several grounds. For example, there is some question as to whether it requires conformity in matters affecting religious and political beliefs . . . . While it utilizes rehabilitation rhetoric, it could be extremely punitive in result and likely to raise the level of tension and alienation among the inmates. [T]here must be concern with any program whose method is a quite detailed regimentation of daily life and whose logic and vision may raise the spectre of the resocialization, rethinking and brainwashing camps of totalitarian societies.[158]

Programs which, like the Prescription Program, use behavior modification or operant conditioning language are in operation in about 20 states, according to Alvin Bronstein, Director of The National Prison Project of the American Civil Liberties Union.[159] The Federal Center for Correctional Research will include a "behavioral research section" for the same types of prisoners as were sent to the Prescription Program; while in New England the majority of the state Governors have "tentatively agreed to back a new joint facility for 'special offenders' that will depend on behavior modification including the 'use of drugs to control disruptive behavior.' "[160]

Prisoners represented by The National Prison Project of the American Civil Liberties Union have challenged two prototypic examples of the escalation of psychiatric punishment-as-therapy.[161] At the Federal Penitentiary at Marion, Illinois, following a disturbance in the summer of 1972, about 115 men were placed in a new "Control Unit Treatment Program." The treatment consists of being locked up in "strip" cells containing only a bunk and a toilet for 23½ hours per day. The guards determine the rate of "therapeutic progress" by studying the prisoners' comments and reading their mail. A lieutenant with a high school education supervises this therapy, and he is assisted by a prison psychologist who visits less than once a week. In other words, the Control Unit Treatment Program is much like an Adjustment Center and, of course,

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[158]*Quoted in* 1 HUMAN CONTROL & EXPERIMENTATION DIGEST 10 (1974). The Select Committee's report is better known as the "Jones Commission Report."

[159]TIME, March 11, 1974, at 75.

[160]*Id.* M. Dumont, Assistant Commissioner for Drug Rehabilitation, Massachusetts Department of Mental Health, has criticized the plan. Noting that 35 percent of the men identified as "special offenders" had been so labeled at least in part because of "political protest" activities, Dumont saw a "dangerous possibility that political activists, organizers, and protesters in prison will be seen as 'special offenders' who require massive and highly professionalized forms of control." 6 SCIENCE FOR THE PEOPLE 43 (March 1974). Camacho's outlook (note 146 *supra*) indicates good reason for Dumont's concern.

[161]Adams v. Carlson, 488 F.2d 619 (7th Cir. 1973).

like the traditional hole.[162] The court has recently ruled that treatment or not, the program constitutes cruel and unusual punishment, both intrinsically and in its disproportion to the magnitude of the offenses during the 1972 disturbance.[163]

The second behavior modification program the American Civil Liberties Union has challenged is the START (Special Treatment and Rehabilitative Training) unit at the Medical Center for Federal Prisoners, Springfield, Missouri.[164] Theoretically, START, following Skinner's advice,[165] eschews punishment. However, the "positive reinforcements" available in the program begin from a base of privation that goes beyond that permitted under the Bureau of Prisons' regulations. These deprivations, essentially those of the Adjustment Center or hole, are justified, the Bureau of Prisons maintains, because regulations on punitive segregation do not apply: START is not punishment, but treatment.[166]

A recital of the attorneys' allegations that START violates constitutional rights of freedom of speech, freedom of religion, freedom from unwarranted search and seizure, and freedom from invasions of privacy[167] would not fully convey the atmosphere of START. That atmosphere is perhaps better expressed by the following incident. The START program prohibits prisoners from expressing opinions when, in the guards' judgment, "such expression 'interferes with the orderly operation of the program.' "[168] On February 3, 1973, Albert Gagné attempted to return legal papers to Edward Sanchez. A guard, perhaps conscious that such papers could indeed interfere "with the orderly operation of the program," ordered Gagné not to return Sanchez's papers. Gagné did not comply, and he alleges that when he walked a few steps further he was seized and beaten by four guards, thrown into his cell, and teargassed while inside. According to his affidavit, he and four other prisoners who verbally protested these proceedings

> were then placed on our stomachs with feet shackled to the bed frame and hands handcuffed behind our backs. We remained shackled until Monday, February 5, 1973. During this period I refused to eat because I would have been forced to eat "dog-style." Additionally, I was forced, because of the refusal of the guards to release me, even for short peri-

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[162]Telephone interview with A. Saunders, Jr., attorney for The National Prison Project, March 14, 1974.

[163]Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill. 1973).

[164]Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973).

[165]See text accompanying note 74 *supra*.

[166]Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973).

[167]Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973) (Plaintiffs' Motion for Partial Summary Judgment, Jan. 7, 1974).

[168]*Id.* at 20-21. The internal quotation is from a START document.

ods, to void my bodily wastes upon myself, the bed and floor.[169]

One may surmise from this incident, and from many others of like nature, that START and its sister programs attempt to "[break] the spirit of man . . . in the service of obedience."[170] That objective would be in keeping with the official aim of START, which is to make it "possible" to return troublesome prisoners from segregation status to the general prison population. From the prison administrator's point of view, a prime function of the hole is to break the will of prisoners who are leaders or militants so that they will not constitute a challenge to official authority. When long periods in isolation fail to produce submission (note Gagné's refusal to eat "dog-style"), it is logical to resort to more extreme measures such as START. Since these more extreme measures go beyond constitutionally permissible standards of punishment, it is necessary to invoke the name of treatment.

Psychiatrists and psychologists may not have taken the *proponent of violence* role in START and similar programs. The planning documents for START read like the corresponding documents for the Adjustment Centers. START is to proceed by "establishment of an Environment where Growth and Changes of the Inmate Occurs [*sic*]."[171] This is to be accomplished by "Implementation of Generalized and Specific Treatment to Meet Individual Needs. . . . Communication should be open at all times between staff and inmates . . . ."[172] There is no reason to suppose that the men who drafted these therapeutic plans for START wrote in a spirit of derisive sarcasm and contempt, nor that the psychiatrists had in mind such "negative reinforcers" as those described by prisoner Gagné. Psychiatrists and psychologists do continue, however, to play important roles in the Bureau of Prisons' legal struggle to continue programs like START.[173] Whether their court testimony and continued support of START comes from the *complaint accomplice*, the

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[169]Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973) (Affidavit of Albert Gagné).

[170]W. GAYLIN, IN THE SERVICE OF THEIR COUNTRY: WAR RESISTERS IN PRISON 330 (1971). *See also* notes 84 & 99 *supra*.

[171]N. Carlson, Procedures for Processing Participants into Project START (SPECIAL TREATMENT AND Rehabilitative Training) Oct. 25, 1972 (Bureau of Prisons Operations Memorandum 7300.128).

[172]*Id.*

[173]The Bureau of Prisons announced the termination of START for "economic" reasons shortly after two of three court-appointed experts in behavior modification had submitted negative reports on the program. *See* note 6 *supra*. However, the Director of the Bureau, Norman Carlson, remains convinced of the value of programs like START. He recently told a reporter: "We're going to start [behavior modification] programs in all our penitentiaries' segregation units. Only they won't have titles that carry such emotion." TIME, Mar. 11, 1974, at 75. *Plus ça change, plus la meme chose.*

*näive dupe,* or the *pressured subordinate* role, only those involved could say.[174]

### 2. Chemical Shackles and Chemical Torture

Perhaps the most ubiquitous form of violent punishment-as-therapy in prisons is accomplished with tranquilizing drugs. To immobilize a person against his will with drugs is violence for the same reasons that chaining a person to the wall with shackles is violence.[175] The comparison between the purpose of forced tranquilization by drugs and shackling was suggested by the Assistant Director of the Illinois Department of Corrections, J.S. Coughlin, who "has defended the use of tranquilizing drugs, such as Prolixin and Thorazine, as 'more effective and humane' than 'manhandling or shackles.' "[176]

There are at least two very important differences between shackling and drugging. Shackling does not cause permanent damage to the brain;[177] and shackling is so conspicuous an inhumanity that it is limited

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[174]In a passive way psychiatry as an organized profession is also involved in legitimizing START and similar programs. In 1972 the trustees of the American Psychiatric Association (APA) appointed an Ad Hoc Committee on the Use of Psychiatric Institutions for the Commitment of Political Dissenters to investigate reports emanating from the U.S.S.R. A member of that committee, David Bazelon, Chief Judge of the U.S. Court of Appeals for the District of Columbia, argued that American psychiatry should " 'stop sweeping its own problems under the rug and conduct an in-depth inquiry into the use of psychiatric discipline in the institutions of our own society,' " including penal institutuions. The APA trustees endorsed Chief Judge Bazelon's proposal, funding was arranged, and a team of researchers was hired. At the last minute the trustees backed off, disbanded the Ad Hoc Committee, dismissed the researchers, and referred the matter to another committee for possible action. Chief Judge Bazelon commented: "Our committee agreed that what we experienced was the ranks of organized psychiatry defensively drawing together; there was to be no scrutiny, even by *insiders*—even they might be foxes guarding the henhouse." Miller, *APA: Psychiatrists Reluctant to Analyze Themselves*, 181 SCIENCE 246, 248 (1973). To know what is done in one's name, and keep silent, is to give consent. *Cf.* notes 7 & 8 *supra.*

[175]*See* note 12 *supra*: "forcibly interfering with personal freedom."

[176]RESEARCH DEPARTMENT, INTERNATIONAL SECRETARIATE, AMNESTY INTERNATIONAL, SUMMARY OF ALLEGATIONS OF MEDICAL AND PSYCHIATRIC ILL-TREATMENT IN UNITED STATES PRISONS 2 (1974).

[177]The phenothiazines (Thorazine, etc.), which are the most widely used major tranquilizers, cause tardive dyskinesia, a form of permanent brain damage, in a substantial proportion of people who are exposed to the drugs over long periods of time. Symptoms of tardive dyskinesia "include involuntary movements especially affecting the lips and tongue, hands and fingers, and body posture. Consequently, speech may be seriously affected, the face may become distorted and subject to uncontrolled expressions, and sustained normal posture may become impossible." H. LENNARD, L. EPSTEIN, A. BERSTEIN, & D. RANSOM, MYSTIFICATION AND DRUG MISUSE; HAZARDS IN USING PSYCHOACTIVE DRUGS 73 (1971). Squibb, the manufacturer of the phenothiazine Prolixin, warns in its promotional literature that the drug can cause "[a] persistent pseudoparkinsonian syndrome

to a few prisoners, whereas drugging can be and is conducted on a large scale. Bowers[178] has compiled reports of extensive administration of tranquilizers in state prisons in California, Oregon, Missouri, and Illinois, and at the Federal Prison at Leavenworth, Kansas.

Most drugging is for the purpose of control, for keeping prisoners quiet and docile. The phenothiazines have been used on a very large scale for this purpose in public mental hospitals for many years, and the advantages for convenience of administration are as real in prisons as in mental hospitals. But some drugs lend themselves to use for punishment or torture as well. An ex-prisoner told this writer: "If you speak out, say things they don't like, if you're a leader, you know—it's an unspoken threat: they'll put you on Prolixin."[179] Another prisoner said: "They use Prolixin more for punitive action than for medical purposes. Someone expressing anger toward the system, or anyone in it, is viewed as expressing bad attitudes and is labeled 'incorrigible.' "[180] Prolixin is approved by the Food and Drug Administration as a treatment for psychosis. Since speaking out, being a leader, expressing anger, or having bad attitudes are not diagnostic of insanity, psychiatrists who signed prescription forms on the basis of such "symptoms" might be liable to legal action. According to Elena Ackel of the Western Center on Law and Poverty, Los Angeles, California, prison psychiatrists have surmounted this problem with a novel diagnostic classification that George Orwell, inventor of Doublespeak, would have understood instantly:

> The prison officials at this institution [California Men's Colony] . . . have also created a new classification called "psychotic repression" meaning that the inmate is psychotic but he is repressing the symptoms of his psychosis. . . . It is apparent that the drug [Prolixin] is also used for control purposes—to undermine resistance and quiet chronic complainers.[181]

One of many descriptions of the effects of Prolixin in large doses will suffice to indicate why it is termed a punishment and torture, as well as an agent of control:

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. . . characterized by rhythmic, jerky, involuntary movements, particularly of the face, mouth, tongue and jaw, resembling the facial grimaces of encephalitis . . . ." *See also* Crane, *Clinical Psychopharmacology in its 20th Year*, 181 SCIENCE 124 (1973); Crane, *Persistent Dyskinesia*, 122 THE BRITISH J. OF PSYCHIATRY 395 (1973).

[178]J. Bowers, Protecting the Convict from the Perversions of Prison Reform 3 (undated manuscript on file at The Wright Institute).

[179]Interview with the writer, March 7, 1974.

[180]Newsletter of the Committee for Prisoner Humanity and Justice (San Rafael, Cal., Jan. 1974), at 5.

[181]CIBA FOUNDATION SYMPOSIUM, MEDICAL CARE OF PRISONERS AND DETAINEES 17 (1973).

Q: How long were you forced to take his medicine?
A: For six weeks.
Q: How many shots did you get?
A: Three. Each one lasted about two weeks.
Q: Will you describe your feelings and how the drug affected you?
A: There is no other feeling like it. Nothing to relate it to, no experience anyone would normally go through in their life. It affects you mentally and physically and you feel suicidal. The physical effects are so bad you can't stand it. You get muscle spasms, predominantly in the legs, but also in all other parts of the body including your facial muscles. You get lockjaw; you can't control your tongue; you get leg cramps. You get so tired (as if you've been up three days in a row) you lie down. But you can't stay down for more than three or four minutes because your knees begin to ache, an itching type ache.

. . . .

Your thoughts are broken, incoherent; you can't hold a train of thought for even a minute. You're talking about one subject and suddenly you're talking about another. You start to roll a cigarette, drop it, pick up a book, take a shit, forget to wipe your ass. Your mind is like a slot machine, every wheel spinning a different thought.
Q: Were you watched so that signals detrimental to your health would be caught?
A: No one watches you in the hole. A doctor visits you once a day and sees you going through your gyrations.
Q: Did he examine you?
A: Only visually—in passing from one cell to another—a glancing diagnosis.
Q: He never entered?
A: No.
Q: Were there other men being given Prolixin at the same time?
A: There were dozens of others. About 200 men.

. . . .

Q: What do you mean, feeling suicidal?
A: . . . The thought of suicide keeps recurring in order to alleviate, once and for all, the torturous effects of the drug.

. . . .

Q: Why did they stop the shots after six weeks?
A: My attorney visited. After seeing me he talked with the doctor, who said I was "suicidal" as a side effect of the drug. The attorney pointed out that I didn't have to take it if I did not want to. . . . Finally they gave me Stelazine . . . .[182]

The role of the psychiatrist in prescribing tranquilizers for sedation or punishment is probably a matter of going along with the wishes of

[182]Newsletter, *supra* note 180, at 5-6.

guards and other administrators in most cases. Such a role is that of *compliant accomplice, näive dupe,* or *pressured subordinate.*

### 3. Keeping the Institution Full

Incarceration itself is a form of therapy-as-punishment when psychiatrists advise parole boards whether a prisoner is "ready" to leave. Psychiatrists are vulnerable to pressures to base such judgments not on their professional opinion, but on the feelings of prison administrators, district attorneys, and judges as to whether the prisoner-patient has served "enough" time for the gravity of his offense.[183]

Pressures to take the *compliant accomplice, näive dupe,* or *pressured subordinate* roles with respect to release of prisoners are not, unfortunately, limited to others' feelings about individual prisoners. Psychiatrists and psychologists receive pressure to keep their institutions full, since budgets and jobs are allotted on a *per capita* basis. When the administration decides to cut the budget the opposite pressure—to certify more inmates as "ready" to leave—may also be imposed.[184]

Although this kind of psychiatric participation in therapy-as-punishment requires but a few paragraphs to describe, it probably results in more man-years of punitive incarceration than all other forms of therapy-by-punishment combined.[185]

The psychiatric roles so far described do not exhaust the possibilities. The role of *courageous opponent* of punishment-as-therapy has been occupied by a few prison psychiatrists and psychologists.[186]

## III. SUMMARY AND CONCLUSIONS

This review has demonstrated that both in theory (Part I) and in

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[183]*See* newspaper reports on alteration of medical records and the resignation of Dr. Michael Serber from Atascadero State Hospital, California. Serber, subsequently reinstated and now Superintendent of the hospital, alludes obliquely to these events in a remarkable letter to the editor, *A Word of Warning to Behavior Modifiers Working in a Restrictive Social Setting,* 3 BEHAVIOR THERAPY 517 (1972).

[184]*See* Mann, *Sentencing in California: A Study in Organizational Interaction,* WORKING PAPERS FROM THE PROGRAM IN L. & SOCIETY, No. 4 (June 1973). *See also* letter from K. Mann to E. Opton, March 7, 1974. This sort of pressure on medical judgment is not limited to prisoners. In 1958, when the writer worked at the Veterans Administration tuberculosis hospital at Oteen, North Carolina, the number of tubercular veterans was on the decline. Faced with a threat to job security, the hospital administration pressured the physicians to pressure their patients to remain on inpatient status.

[185]*See generally* N. KITTRIE, THE RIGHT TO BE DIFFERENT (1971).

[186]*E.g.*, Howard Gross, who resigned from the Missouri prison system in 1972 in protest of the use of Prolixin. He said the drug caused "hunched backs 'like a cat when it gets ready to fight.'" SUMMARY OF ALLEGATIONS, *supra* note 176, at 2. For the reasons discussed by Powelson & Bendix note 154 and accompanying text *supra* such men do not last long in prisons.

practice (Part II) psychiatric therapy in prisons is often indistinguishable from punishment. The impossibility of differentiating some therapies from some punishments indicates not too close a similarity, but an identity. Punishment has long been acknowledged an important tool of psychiatric therapy and it remains well-recognized, though controversial, today. Therapy and its synonyms, "corrections," "rehabilitation," and "treatment," are prime motives of those who design and operate the punitive institutions of society.

Over the years Americans have become very considerably less willing to permit torture and other extremely severe punishments in their penal institutions. The first, fourth, fifth, eighth, and ninth amendments to the Constitution place some limits on legal punishments,[187] and feeble as these limitations are in practice,[188] they do exist and they are slowly acquiring real force and effect. Penal administrators turn, therefore, to therapy-as-punishment to carry out acts which, if named punishment, would be clearly illegal and immoral.

The courts have been exceedingly slow to see through this subterfuge. Only those practices most shocking to the conscience have been prohibited, and those often only on appeal. Other practices which would be shocking indeed if they were called punishment remain legal.

The reluctance of the courts to grant prisoners rights against therapy-as-punishment has more than one source.[189] The desire to sanction draconian revenge—and to slay man's inner devils, which he projects onto those labeled deviants[190]—while excluding the responsibility from consciousness and conscience, is most important psychodynamically. Calling the process "therapy" or "corrections" or "rehabilitation" or "treatment" enables men to exclude the responsibility from consciousness, and thus to keep the burden of punishment from the consciences. But the most nearly logical basis for the courts' reluctance, and the key rationalization, is the *parens patriae* theory.[191] The *parens patriae* theory assumes that the prison psychiatrist and psychologist are motivated solely, or at least mostly, to help the prisoner and not to harm him. The analysis in this article of the flux of pressures on the prison

[187]Sanchez v. Ciccone, No. 20182-4, 3061-4 (W.D. Mo. 1973) (Plaintiffs' Motion for Partial Summary Judgment, Jan. 7, 1974); Shapiro, *supra* note 85.

[188]Rubin, *supra* note 98.

[189]*See* notes 95, 102, and 103 & accompanying text *supra*.

[190]For the theory of projection *see* Bellah, *Evil and the American Ethos*, in SANCTIONS FOR EVIL, note 95 *supra*, at 184-87; Comstock, *Avoiding Pathologies of Defence, id.* at 294-95. For the creation of deviants by labeling *see* Currie, *Crimes Without Criminals: Witchcraft and its Control in Renaissance Europe*, 3 L. & SOCIETY REV. 7 (1968). Currie concludes "systems of repressive control tend to foster the growth of an 'industry' geared to the official creation of deviance . . . ." *Id.* at 31.

[191]*See* N. KITTIRE, *supra* note 185, at 8-11.

psychiatrist shows that the assumption of good intentions, of *parens patriae*, is untenable. The numerous examples of therapy-as-punishment cited in this article show a pattern: unconstitutionally severe and arbitrary punishment and torture of prisoners in the name of therapy occurs on a *major* scale. Fueled by advances in medical technology and by increasing legal limitations on punishment, therapy-as-punishment is rapidly growing in frequency and intensity.

*At a minimum, courts should apply to therapy-as-punishment both rights against punishment and rights against treatment.*[192] This could have very far-reaching effects, especially with respect to the indeterminate sentence. The raising of the courts' consciousness may occur sooner if opponents of involuntary, punitive therapy oppose it not on the grounds that it is "really" punishment rather than therapy, but on the grounds that it is both punishment and therapy, hence meriting the constitutional and other legal safeguards of both.

C.S. Lewis summarized this reasoning well:

> Of all tyrannies a tyranny exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience. . . . To be "cured" against one's will and cured of states which we may not regard as disease is to be put on a level with those who have not yet reached the age of reason. . . . You start being "kind" to people before you have considered their rights, and then force upon them supposed kindnesses which they in fact had a right to refuse, and finally kindnesses which no one but you will recognize as kindnesses and which the recipient will feel as abominable cruelties.[193]

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[192]For a more detailed exposition see N. KITTRIE, *supra* note 185.

[193]Quoted in a pamphlet by Network Against Psychiatric Assault (San Francisco, March 1974).

# THE "CLOSING" OF O WING AT SOLEDAD PRISON: REFLECTIONS ON THE USE OF LOCK-UP

*Fay Stender**

## I. Soledad 1970-71†

### *A. Introduction*

In the prison world time is the ally of bureaucrats. Prison authorities are almost absolute, almost completely unrestrained in their power to restrain others. For outsiders, whether lawyers, former prisoners, or other citizens, who would work to check this power and thus help prisoners retain and regain their rights as human beings, time is an antagonist with almost as much force as the absolute power of the bureaucrats.

This article examines one particular attempt at reformation: an attack, in 1970-71, upon the terrifying practices in the maximum security sections at Soledad Prison in California. The failure of this fairly elaborate effort shows in practical terms the immutable power of the prison and the ability of the warders to outlast those who would call them to account.

The penal euphemisms are similar in California to those used elsewhere. The people who run California's prisons are known as "corrections" personnel. The prison at Soledad is known to them as a "correctional training facility" (CTF). The "maximum security" section of the central prison building, O Wing and X Wing, in which a man is confined by himself in a 6 foot x 10 foot x 8½ foot cell for 23½ hours a day, is known to corrections personnel as the "Adjustment Center" (A/C). Thus in official terminology of the California Department of Corrections "CTF Central A/C 0-1" refers to the first floor of Soledad's O Wing. The abbreviations are part of the language of insulation which separates these men from the consequences of their actions. Their victims know "CTF Central A/C 0-1" as "Max Row" in "the hole," a place where they may be locked up indefinitely for unspecified reasons, denied privileges accorded other prisoners, and subjected to brutal, degrading, and even lethal assaults upon their bodies and their minds.

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The author is greatly indebted to Henry Mayer for research, writing, and editorial assistance.

†Editor's Note: All quotations in this article are exact transcriptions of the letters, documents, and statements cited. *Sic* is not used.

Today, as in 1970, there are slight differences between O and X wings. In O Wing the cells have solid walls on three sides and a barred door covered with heavy steel mesh in some instances, and there is a narrow slot through which food is passed. Air is circulated through ventilators; there is no natural light. In X Wing the cell door is of solid metal, except for a small opening and a food tray slot. On O Wing the gun tower is outside, overlooking the exercise yard; on X Wing the gun command post stands in the corridor between the tiers. Cells on the upper tiers of X Wing have windows, and inmates were permitted to request educational books from the prison library. O Wing inmates could order only law books and were permitted to keep them for only a few days at a time.

On both wings the cells were and are furnished with a bed made of solid steel suspended 2 feet off the floor, a toilet, and a sink. These furnishings occupy most of the available space. Both wings have even smaller isolation cells; the screaming of a man in "isolation" cannot be heard on the rest of the wing.

There are a total of five Adjustment Centers in the California state prison system. The official rationale for these sections is that they are for the confinement of inmates with a record of violent and dangerous prison behavior. Dr. Frank Rundle, chief psychiatrist at Soledad in 1970-71, estimated that less than 5 percent of the population in the A/C were "truly violent" types, and men he would so classify had spent "up to ten years" in Adjustment Centers and were "psychologically destroyed" by the experience. About 20 to 30 percent of the inmates in the Adjustment Centers are mentally ill and in need of hospitalization. Some men are confined for their own protection, and some at their own request, but the majority are locked up for relatively minor prison offenses, generally ones that indicate a disrespect for authority. Men of outspoken political views are often classified as "agitators" and sent to the Adjustment Center where they may view themselves as political prisoners, and where they are often referred to by prison authorities as politically oriented prisoners.[1]

In July 1965 Robert Charles Jordan, Jr., a black prisoner on O Wing, was confined for 12 days in a "strip cell" in the isolation section. The cell was completely dark and contained no furnishing except for a raised concrete commode that could not be flushed from within the cell. The bodily wastes of previous occupants still covered the floor; the continuous stench gave Jordan frequent spasms of nausea; his vomit

[1]*See In re* Hutchinson, 23 Cal. App. 3d 337, 100 Cal. Rptr. 124 (3d Dist. 1972) (Affidavit of Frank Rundle, M.D. Exhibit 3 to Petition for Writ of Habeas Corpus in the 3rd Appellate District, therein numbered 3 Crim. 4328). *See also* Hollander, *The Adjustment Center, California's Prisons within Prisons,* BLACK L.J. (UCLA) 152. (1971).

was never cleaned up. He was compelled to sleep upon the cold and filthy floor, with only a stiff 4½ foot x 5½ foot canvas mat as cover; the mat was too stiff to be folded in a way that would allow Jordan, 6 feet 1 inch tall, to sleep under it. For the first 8 days, Jordan was denied all clothing. For the entire period he had no means of cleaning his hands, body, or teeth, and was forced to handle his food without any provision for sanitation.

This was not Jordan's first such experience. He lived under repeated threat of strip cell confinement. On O Wing he occupied a cell directly opposite windows without panes, so that he was exposed to rainstorms and other inclement weather. If he complained about this or any other abuse, he was liable to be put in a strip cell for up to 60 days at the discretion of the O Wing guards.

Jordan initiated a federal lawsuit against Soledad Superintendent Cletus Fitzharris and other Soledad prison officials, claiming that his strip cell treatment violated his constitutional protection against "cruel and unusual punishment."[2] Judge George B. Harris, who heard the case, personally visited Soledad and later held that the testimony of Jordan and other inmate witnesses remained "clear and convincing" after cross-examination.

In his opinion, now famous for initiating some of the recent changes in prison law, Judge Harris reiterated that:

> [U]sually the administrative responsibility of correctional institutions rests within the province of the officials themselves, without attempted intrusion or intervention on the part of the courts. However, when as it appears in the case at bar, the responsible prison authorities . . . have abandoned elemental concepts of decency by permitting conditions to prevail of a shocking and debased nature, then the courts must intervene—and intervene promptly—to restore the primal rules of a civilized community in accord with the Constitution of the United States.[3]

Judge Harris emphasized that "the security officers made no effort to remedy the situation, notwithstanding persistent and violent complaints on the inmates' part."[4] His opinion took note, however, of the remedial actions prison officials had undertaken as an apparent result of the filing of Jordan's suit. Superintendent Fitzharris had reported that: "[w]e have installed an automatic flushing device for the oriental toilets in the strip cells. This eliminates the possibility of staff becoming involved in other matters and not flushing the toilets with regu-

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[2]Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).
[3]*Id.* at 680.
[4]*Id.*

larity."[5] Further testimony indicated that by the time of trial, "an inmate so incarcerated [in a strip cell] now receives a basin, pitcher of water, towel, toothbrush and toothpaste, toilet tissue, and is permitted to shower once a week."[6] Judge Harris permanently enjoined the subjection of prisoners to the cruel and unusual punishment given Jordan. He did not, however, undertake to specify the precise procedures which the officials were required to adopt if they were to meet the demands of the Constitution. He ordered "at least" the revisions already reported and conformity with strictures on ventilation, lighting, and sanitation enumerated in the Manual of Correctional Standards of the American Correctional Association.

The court justified its intervention as necessary to correct the gross abuse of official discretion, yet it relied upon the discretion of the Soledad guards and administrators to choose specifically appropriate remedies. Only the narrowest possible compliance resulted. In 1970 Robert Jordan assessed the effects of his successful law suit, as follows:

> There were, it is true, some minor changes in certain procedures . . . slight physical adjustments to the mandate of the court order. The strip cells are still such that a human being should not be made to undergo incarceration in one. They are still dirty, they are still poorly ventilated, they are still poorly heated and in most cases the lighting provided is deliberately not turned on. . . . The amount of exercise allowed inmates confined in a strip cell would not keep the muscles and body of a year-old baby in tone and in good health. The open mouth toilets are still smelly and the inmate must still eat his food within the same space, within 5 feet of the smelly naseous fumes arising from the toilet. It does not sound too bad when you say it or read it, but I would like to record the reaction of the average citizen of the U.S. to the suggestion that he or she eat 7 days a week, 3 times a day in their family bathroom. The situation is further compounded by the fact that the toilets in the strip cells are communal in nature and the previous user may have been infected with a highly infectious disease. The toilets are never given any disinfectant treatment, nor are inmates provided with any, only with scouring powder.
>
> The psychological aspects of the strip cells are unchanged. Strip cells were and are designed with one purpose in mind: to break the will and spirit of the inmate subjected to incarceration in such a cell. Not to "control" the inmate. Not to "quiet down" an inmate. Not to prevent an inmate from harming himself. Not to prevent an inmate from agitating others. But purely and simply to break the inmate's will. To break the inmate's spirit.[7]

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[5] *Id.* at 681.

[6] *Id.* at 682.

[7] MAXIMUM SECURITY, LETTERS FROM CALIFORNIA PRISONERS 132-33 (E. Pell ed. 1973).

Although there was not a complete compliance with the court's order, the fears expressed by Judge Harris were, unfortunately, fully realized:

> In the opinion of the court, the type of confinement depicted in . . . the inmates' testimony results in a slow-burning fire of resentment on the part of the inmates until it finally explodes in open revolt, coupled with their violent and bizarre conduct.[8]

Soledad had previously experienced racial riots in 1964 and 1965. In 1968 several "major incidents" of inmate rebellion occurred, involving physical struggles with guards and property destruction. In that year, three inmates were murdered by other prisoners, three inmates were assaulted by other inmates, and one prisoner died "mysteriously" at Soledad. Almost all of these incidents involved racial strife. In 1969 there were two deadly assaults, two racial clashes, and one inmate labor strike.[9]

### *B. The Events of 1970-71*

On the morning of January 13, 1970, the 13 inmates from "Max Row" were stripped and searched before being released into the yard one at a time, alternating by race. The corridor, says inmate Tomas Meneweather,

> was congested with prison officials of all ranks . . . armed with an assortment of tear-gas guns and containers, billy clubs, five-cell flashlights, and handcuffs . . . . [wearing] an assortment of expressions from sneers, smirks, and nervous expectation to outright malicious smiles.[10]

In the yard a fight broke out between a white inmate and W.L. Nolen, a black inmate. The guard in the guntower 13 feet above the yard fired four shots, killing Nolen and two other blacks, and wounding one white inmate. Prison officials maintain that a warning shot was fired; inmates deny the claim. Meneweather carried one of the mortally wounded blacks to the O Wing entrance, but was forced to return to his cell before guards would allow the bleeding man to be taken to the hospital.

Inmate Hugo Pinell had been taken to Sacramento for a court appearance that day, and heard

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[hereinafter cited as MAXIMUM SECURITY].

[8]257 F. Supp. at 680.

[9]Rundle, *The Roots of Violence at Soledad*, in THE POLITICS OF PUNISHMENT 164 (E. Wright ed. 1973).

[10]MAXIMUM SECURITY 137-38.

> the news on the radio where it announced the killing of three inmates at Soledad . . . while scuffling in the yard. Damn, for some reason I knew what yard that man on the radio was referring to, because I fell to my knees against my will, and tears rolled out of my eyes. Believe me, I'm a man in every respect, but if you felt the tension we live under you could easily understand a grown man crying . . . . I cursed people out for no reason because, after all, it wasn't their fault. I returned here [Soledad] the next day and I could smell death in the air. The tier was like a tomb—I was put in my used to be personal friend's cell; W.L. Nolen. I asked what happened and they told me (blacks) that W.L. Nolen, Cleveland Edwards and Alvin Miller were shot down like ducks in a pond. Pay full attention to what I have said, because even today we live under the same conditions and that murder out in the yard could easily have been me or the rest of the blacks down here. Or maybe we get it next time? All I do is ask myself "Is this the price a man has to pay for wanting to be Black and respected as such, as he respects others?" I tell you, it is cold-blooded![11]

The exercise yard killings left its black survivors with a mixed legacy of melancholy fear and aggravated bitterness which—in the nearly hysterical atmosphere of O Wing—would haunt Soledad for many months to come.

Prison officials indicated no perceptions of these feelings in their reports of the shootings. Superintendent Fitzharris' initial report to Director of Corrections Procunier, dated on the day of the incident, is callously entitled: "Incident Report—Racial Gang Fight on O Wing Yard. Sixteen (16) inmates involved. Four shots fired and four men wounded and removed from the yard."[12] An acknowledgement of the deaths of the three "wounded" black men is literally buried in technical language quoted from a medical report. Six of the eight blacks are characterized as "racial extremists" although none of the whites are so described.[13] A report dated January 14 (1970) to Fitzharris from O Wing Program Administrator E.A. Peterson loosely describes the late Cleveland Miller as a "racial agitator at CTF/N prior to coming to Central" and repeats the contention of a Riverside (California) County Jail official that Miller "was one of the most dangerous inmates they ever had."[14] The implication is clear that their hearsay reputations were considered justification for their summary execution. Peterson pointed out that the "hate or alliances [among the men in lock-up] go deep and

[11]Letter from Hugo Pinell to Fay Stender, August 21, 1970, on file at the Prison Law Project, Berkeley, California.

[12]Incident Report of Soledad Correctional Training Facility, January 13, 1970, on file at the Prison Law Project.

[13]*Id.*

[14]*Id.*

many are of long years standing, i.e. a friend of mine was stabbed by a friend of yours, so I'm going to have to stab you."[15] Such language also might be used to describe the mental states of the constabulary as well. Peterson's statement, moreover, might also be taken as prophecy. Three days after the exercise yard shootings, on January 16, 1970, the Monterey County District Attorney publicly told reporters that, in his personal opinion, the killings were "probably justifable homicide by a public officer in the performance of his duty."[16] That night a Soledad guard was found dead in Y Wing at Soledad Central.

Three black inmates, George Jackson, John Clutchette, and Fleeta Drumgo were moved to Max Row, O Wing, and subsequently were charged with murder of the Y Wing guard. The legal defense of these three prisoners, who became known as the Soledad Brothers, developed into a prison movement focusing around a campaign against conditions in O Wing.[17] It is this campaign, which broadened into an attempt to end the use of lock-up as a major penological tool in California, which furnishes the object lessons of this article. As the attorneys and their coworkers began to visit Soledad to interview the accused prisoners and the inmate witnesses to the murky events in Y and O Wings, the lawyers began to feel the extent of O Wing terror.

A steadily increasing number of inmates began to write letters to the Soledad lawyers, outlining the barbarous and discriminatory treatment they had experienced. The letters described the provocative behavior by guards—especially racial vituperation and the deliberate mixing of violatile racial groups—designed to goad inmates into angry reactions that would lead to a disciplinary "write-up." They told of the extraordinary discretion employed in disciplinary procedures; the unstated rules, the presence of the accusing officer on the hearing panel, the inability to make an adequate defense by calling witnesses, etc. The letters described extreme and needless deprivation, beyond what would reasonably be necessary to maintain order. In this context of disciplinary deprivation, they related innumerable examples of inadequate and delinquent medical care.[18]

The legal workers gathered around the Soledad Brothers case began an effort to probe deeply into these issues, to get beyond the superficiality and deceptions of "official" versions. They felt a moral imperative to act upon what they had learned and undertook the political task of teaching people the need to act against these forms of social injustice.

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[15]*Id.*

[16]Yee, *Death on the Yard*, RAMPARTS, April 1973, at 39.

[17]Attorneys included Fay Stender, San Franciso; John Thorne, San Jose; Floyd Silliman, Salinas; Richard Silver, Carmel.

[18]*See generally* MAXIMUM SECURITY.

Their activities directly countered the official efforts at public relations which sought to dissuade people from thinking that their engagement or action was necessary.

The techniques of such political education were numerous and included public speaking, preparation and distribution of literature, attempts to secure adequate press and radio-television coverage, organizing campaigns to inform public officials, securing the involvement of state and federal agencies and private experts, and the creation of an ever-widening circle of people actively engaged in talking to groups of their own special concern. Many struggles developed within the defense group over the priorities of one activity over another. Would a large public demonstration jeopardize contacts with influential, yet cautious politicians? Was it worthwhile to spend any time chasing after such people, since such efforts are generally doomed to futility and take time away from other, more promising tasks and obligations?

"Getting through" to politicians, who lead busy and well-protected lives, often insulated from direct contact with the flow of everyday life, was an especially frustrating task. Keeping news media reporters well informed and interested was developed into a political art of considerable proportion. As in any educational campaign of this type there was much wasted effort; setting up events that never quite came off, enlisting people who proved ultimately ineffectual or chasing after those who never responded favorably, haggling endlessly over fine points of political detail. This latter process worked, as always, as a major barrier to general reform, but the description here is intended to provide some understanding of the limits placed upon the efforts to educate public opinion about O Wing in 1970-71.

Efforts were made to secure a legislative investigation into conditions at Soledad. Phrasel Shelton, a Salinas attorney working with the Public Defender's Office in Monterey County, began calling for an official, biracial investigation almost immediately after the Grand Jury returned its verdict of justifiable homicide in the exercise yard killings. During interviews with Pacifica Foundation Radio Station KPFA in March 1970, three black legislators, State Senator Mervyn M. Dymally, and Assemblymen Bill Greene and Willie Brown, Jr., had supported the idea of an investigation into Soledad and prison conditions generally. Brown indicated the hope that a blue-ribbon citizens group might be convened to examine the Soledad situation,[19] and all three legislators intimated that, if nothing else, an ad hoc investigation would be undertaken by the black legislative caucus. Senator Dymally had, in fact, already visited Soledad on February 1, 1970, where he was upset at the

[19]Soledad Prison Interviews, by Elsa Knight Thompson, March 1970, on file at Pacifica Tape Library, Los Angeles, California.

sight of George Jackson in chains and unable to light a cigarette.

Despite these expressions of concern, nothing came of these first suggestions to secure either a legislative or citizens' investigation. In May 1970 the Soledad attorneys received a desperate phone call from a University of California faculty member at Santa Cruz stating that a reliable staff source at Soledad had warned him that the lives of five black inmates were in immediate danger. Lawrence Mansir, Deputy Attorney General, and Edward Barnes, Deputy District Attorney in Monterey County, were informed of this. The names of the inmates were made public, and they were immediately transferred. Telegrams were also sent to each of the black members of the legislature informing them of this situation along with a five-page sample compilation of letters from the Soledad inmates. These complaints emphasized the physical brutality of the guards, the irrational madhouse atmosphere which "justified" keeping nearly half of O Wing on tranquillizers, the endemic racism, and shocking denials of medical care for epileptics and others suffering from undiagnosed internal ailments.[20]

The legislators invited Soledad Director Procunier to discuss these reports with the caucus. Attending a meeting on the subject were Assemblymen Brown, Bill Greene, John J. Miller, and Leon Ralph, legislative aide James Turner, Attorney Fay Stender, and Procunier. Procunier saw no need for a biracial investigating committee. Upon being handed the compilation of inmate letters, he glanced at the first page and said, "Lies. Furthermore, I will take you there and show you." He stated the visit would be unannounced, but later informed the delegation which was to visit Soledad that he had changed his mind on this point. The visit was announced before hand to the Soledad staff. Senator Dymally was selected as caucus representative, and, accompanied by Turner, State Senate Consultant Daniel Visnich, Stender, and Eve Pell, visited O Wing on June 1, 1970. In the few days prior to the visit, members of the Soledad defense team assisted Senator Dymally's staff in preparing a questionnaire to be distributed at the prison and generally attempted to brief the staff with what they had learned about the prison in the previous several months.

The Dymally group spent 2 hours on O Wing. Dymally listened to the talk of the caged inmates and seemed visibly touched. Inmate

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[20]Communications from Inmates on O Wing, Soledad Brothers Defense Committee, mimeo 5 pp. May 1970, on file at Prison Law Project. *See also* BLACK CAUCUS REPORT, TREATMENT OF PRISONERS AT CALIFORNIA TRAINING FACILITY AT SOLEDAD CENTRAL (1970) (Report for the California Legislature) available from Senator Mervyn Dymally, State Capitol, Sacramento, California [hereinafter cited as BLACK CAUCUS REPORT] *reprinted in Hearings on Corrections Before the Subcomm. No. 3 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., Part II, Prisons, Prison Reform & Prisoners' Rights, Ser. No. 15,252 *et seq.* (1971) [hereinafter cited as 1971 *Hearings*].

Eugene Grady told him he had received no medical attention for an ulcer condition, although he had been spitting blood for some time. Other inmates repeated stories of contaminated food and racial abuse. Dymally met some inmates who told him they had been placed in O Wing for "investigation"; others said they had no idea why they had been removed from the relative freedom of the general population. The group only learned after its visit that seven more black inmates had been recently assigned to O Wing, and were there on the day of the tour, as punishment for collecting money from inmates for the Soledad Brothers Defense Fund.[21]

Frank Powell, an aide to Procunier, followed Dymally around and murmured, "Yeah, I'll take care of it" as various complaints were eloquently lodged. When asked how that would be possible, since he was taking no notes, he pointed to the numbers along the cell doorways and said, "I'll remember."

The visiting delegation was visibly stunned by the dislocation of walking along the upper tier, hearing the shouts of men in isolation, and the metallic reverberations from men beating on their cell walls. Later, George Jackson's words would be published in *Soledad Brother:*

> [A] man's thoughts become completely disorganized. The noise, madness streaming from every throat, frustrated sounds from the bars, metallic sounds from the walls, the steel trays, the iron beds bolted to the walls, the hollow sounds from a cast-iron sink or toilet—when a white con leaves here he's ruined for life. No black leaves Max Row walking. Either he leaves on the meat wagon or he leaves crawling licking at the pig's feet.[22]

After the O Wing visit, the group met with Procunier and Superintendent Fitzharris. When Senator Dymally asked Fitzharris about Eugene Grady's ulcer condition, Fitzharris replied: "We have to have a lot of blood before we give an X-ray. Otherwise everyone would want one." Procunier told the visitors that reports of urine and feces should not be believed. He was asked to explain the prevalence of such reports and was unable to give an answer. Procunier denied permission to circulate the staff questionnaire to the black inmates of O Wing, but did consent to allow three staff aides of the black caucus to make a more extended visit to Soledad on June 18-19.

After this second visit, which entailed extensive interviews with both inmates and officials and visits to other sections of the prison, the legislative staff prepared a draft report and recommendations for which

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[21]1971 *Hearings* 255.

[22]George Jackson letter to Fay Stender, April 1970, in G. JACKSON, SOLEDAD BROTHER 26 (Bantam Books ed. 1970).

Senator Dymally secured the approval of the black caucus. Printing delays held up publication of the report, but it was finally released, with the state seal on its cover, on August 2, 1970.

The report summarized the visits and complaints heard, and concluded:

> Neither group of visitors had enough time or manpower to investigate any of the charges in detail. However, all were convinced that racist attitudes and practices on the part of correctional officers were common at the Soledad facility. . . . If even a small fraction of the reports received are accurate, the inmates' charges amount to a strong indictment of the prisons' employees (on all levels) as cruel, vindictive, dangerous men who should not be permitted to control the lives of the 2,800 men in Soledad.[23]

The report warned that without an independent investigation authorized by the legislature, the authors feared that the legislature would be encouraging policies which "every legislator would find repulsive."[24] The black caucus also urged the creation of a prison board of overseers independent of the Department of Corrections, empowered to evaluate inmate allegations of mistreatment. Such a board, the report urged, "would serve to right, if only slightly, the absolute absence of 'civilian' control over prison employees, which now allows all manner of informal (sometimes corporal) punishment to go unchecked."[25]

Other recommendations emphasized the need for prison officials to end intentional intimidation, to provide procedural safeguards in disciplinary hearings, as well as annual medical check-ups, psychiatric evaluations for staff having regular inmate contact, in-service staff training on racial and ethnic issues, and increased exercise time for men on O Wing, pointing out that the 23½ hour lock-up defied "rational explanation" and contributed to the high tension and outbursts of violence.[26] The report pointedly asked for the removal of Correctional Officer Maddix, who "personifies the racism, brusque demeanor, harsh vocabulary and authoritarian attitudes which are so detrimental to proper and judicious inmate/staff relations."[27]

In response to the Black Caucus Report, which he termed "unfair," Cletus Fitzharris announced that he would welcome a "professional investigation" into Soledad. Arguing that the press had been given an exaggerated impression of racial problems at his prison, Fitzharris told

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[23]BLACK CAUCUS REPORT 5.
[24]*Id.*
[25]*Id.*
[26]*Id.* at 257.
[27]*Id.* at 256.

reporters, "I don't think it's so bad here."[28]

Yet Officer Maddix was shortly thereafter removed from O Wing, and the exercise period was extended from 30 minutes per day to 1 hour per day. The more thoroughgoing proposals made by the Black Caucus received little, if any, public consideration, perhaps partly because the report was eclipsed shortly after its release by the dramatic kidnapping and shooting incident at the Marin County Civic Center involving George Jackson's brother Jonathan, giving rise to the prosecution of Angela Davis and Ruchell Magee. This news clearly had the effect of making it more difficult for prominent and sympathetic politicians to discuss the prison conditions from which such violence grows.[29]

California prison officials used their own considerable arsenal of public relations techniques to counter the attention being drawn to O Wing by those who would change it. On August 25, 1970, corrections officials invited representatives of the major national newspapers, magazines, and television networks to tour the prison. Soledad legal defense workers learned of this impending tour from a sympathetic newsman the evening before it was to take place. Pacifica Radio Station KPFA was alerted and sent an uninvited news team to the prison. Hugo Pinell's letter of August 21, 1970 was furnished to KPFA's team with sufficient copies to distribute to the press assembled at Soledad.[30] Officials were questioned closely about the letter, as the photographs Pinell described were being handed out in press kits, and, urged on by the suggestion of hidden practices, a photographer and TV film crew managed to get themselves escorted through O Wing early enough in the day to permit interviews with inmates to make eastern network news deadlines.

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[28]San Francisco Chronicle, August 4, 1970, at 2, col. 3.

[29]Ms. Davis was acquitted; Ruchell Magee faces a second trial after lengthy and tragic court battles.

[30][W]hat good does it do to withstand all these injustices if we remain in the same dungeon day after day? We are cautious! We are well behave and yet nothing is granted. We simply don't want to remain down here any more. Today, some people from main line came around gifting ice-creams to every inmate down here! Plus they brought a photographer to take pictures while the ice-cream was being dish out! Can you see the picture? That has never been done before in the history of Max Row since I've been aware of this tier which goes back to 1965. . . . These officials continue on making us /all/ walk down the hall-way with our hands cuffed behind our back. This shows two things: "animalistic treatment and insecurity to the inmate of Max Row because our pictures are paint as those of true incorrigibles—which is not true—and this can endanger the Max Row inmate's life while walking in this manner and he has no defense of self."—[I] want you to know we didn't ask or wanted any ice-cream or any of their photographs and that we understand why it was done and that it was against our consent . . . .

Letter from Hugo Pinell to Fay Stender, August 21, 1970, on file at the Prison Law Project, Berkeley, California.

Soledad continued to be a focus of national press coverage during the winter of 1970-71. The publication in October 1970 of George Jackson's prison letters drew more attention to the case and conditions on O Wing. The book sold 250,000 copies in its first year of publication and has now been translated into 14 languages.

But the tempo of events within Soledad prison in 1970-71 had quickened. On July 7, 1970, nearly all the inmates of O Wing burned clothing and mattresses and staged a hunger strike to protest continued physical abuse.

On July 13, 1970, a white guard named William Shull was fatally stabbed in Soledad North. Fifteen suspects were immediately transferred to O Wing. One black inmate, Roosevelt Williams, recalled being removed from his north cell without explanation; en route to "the hole" a guard told him, "You're going to the gas chamber." Later, in O Wing, "I just lay there," said Williams. "I thought, they're going to kill me."[31] Prison officials first investigated Mexican-American inmates with whom Shull had been having difficulties but failed to establish any case at all.

The authorities then focused their inquiry upon a group of black inmates who had organized an evening tutoring class which officials held to be a wellspring of prison militancy. In September seven black prisoners, including Roosevelt Williams, were charged with murder and conspiracy, and a second dramatic Soledad prison case began to make headlines, further aggravating suspicion and tension within the institution.[32]

In October of 1970, Officer Maddix, who had been removed from Max Row following the publication of the Black Caucus Report, was reassigned to the second-tier of O Wing, where most of the "activist" blacks had been sent. Meneweather, Pinell, and 15 other inmates wrote the following:

> October 23, 1970. Dear Attorney Stender: Friday Officer Maddix came back to work here on O-Wing "second tier." And his first move following his return was to make it a point to let us know he had returned, and that he is virtually obsessed with vengeance for the "temporary interruption of of his programs . . . ." [His] return comes as no surprise to us as such a move is an official policy designed to make it

[31]Pell, *The Soledad Seven: Attempted Murder in Monterey*, in THE POLITICS OF PUNISHMENT 213 (E. Wright ed. 1973). Details of this prosecution are taken from Pell's account at 199-221 *passim*.

[32]In February 1972 a new District Attorney in Monterey dropped charges against four of the men without explanation. Charges against the remaining three prisoners were dismissed in the midst of their trial when inmate witnesses for the prosecution confessed to having invented their stories under coercion from prison officials.

> appear to us and all inmates in general that complaints or any other form of attempting to expose the illegal, wanton and savage acts of the officials is but useless and a waste of time and in any event not worth the deadly retaliation that is sure to be perpetrated against us for our efforts. We would further like to point out that Officer Maddix's return to O-Wing has caused a devastating impact of fear and terror among virtually the whole inmate population of O-Wing ourselves included . . . Respectfully submitted.[33]

Within a week O Wing inmates launched a hunger strike

> interracially, individually and collectively . . . [to] serve notice on you that no longer will we allow you to manipulate us and exploit our mutual suffering from the conditions imposed on us by your individual and concerted efforts to dehumanize us and perpetrate against us every crime conceivable to your distorted minds for your sadistic satisfactions.[34]

Among their demands were pleas to end the practice of confining "suspects" from other parts of the prison in O Wing indefinitely, to expand visiting privileges for inmates under public indictment, to improve the "dog food tuna" lunches and eliminate the inedible "special isolation diet," to guarantee fair procedures in disciplinary hearings, and to permit inmate Earl Satcher, in isolation, to rejoin his fellow inmates on upper O Wing "whom he is properly able to function with, rather than be transferred to X-Wing, where he doesn't feel comfortable or secure. No inmate should be forced against his will."[35] The strike ended 2 weeks later; the only demand achieved was the addition of soup to the lunch menu. One inmate wrote:

> Outwardly and materially our food strike was a dismal failure, we only gained a bowl of soup, but the harmony, unity, and greater understanding that evolved between the races was a tremendous gain, but immediately after the strike, the staff no longer held inmate staff meetings, certain porter positions and privileges were eliminated and the rumors of pending racial clashes began to fly from certain keepers mouths.[36]

Securing any cooperation at all among the racial groups on O Wing is an achievement that should not be passed over lightly. Its fervid atmosphere is not conducive to building the trust upon which working relationships are based. On O Wing even the slightest alteration of

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[33]Letter from Tomas Meneweather to Fay Stender, October 23, 1970, on file at the Prison Law Project, Berkeley, California.

[34]Affidavit of Deposition of Demands, November 1, 1970, in MAXIMUM SECURITY 152-56.

[35]*Id.*

[36]Letter of O Wing Inmate, December 18, 1970, in MAXIMUM SECURITY 157.

gesture or tone can easily be interpreted as a sign of hostility or impending treachery. Minimal opportunities exist for potentially constructive interactions, especially because the psychic impact of long months or years of such confinement produces emotional instability bordering upon, and sometimes crossing into, psychosis. In such circumstances only the bravest and strongest men can risk the unusual acts of leadership that transform emotional hostilities into political alliances.[37]

In the midst of the strike, prison officials suddenly transferred a group of inmates from San Quentin to O Wing, presumably to "break" the strike. Robert D. Harkins, a young white prisoner with a reputation as an informer, was among this group. Within a day of his arrival, Harkins was dead of stab wounds. Inmate medical assistants told Soledad lawyers that the on-duty prison physician took 50 minutes to respond to the call and then refused to perform the emergency surgery, which was standard in such cases, to prevent Harkins from bleeding to death.

Harkins' parents contended in a subsequent damage suit that their son had been used "as a pawn" in an inmate-staff conflict. They argued that prison officials should have known that a new arrival would be subject to special pressure and special danger on O Wing, and they accused Soledad authorities of negligence in failing to provide safe housing and adequate medical care for their son.[38]

Aggravated tensions approached the breaking point in early 1971. O Wing officers undertook a campaign of harrassment which began by withdrawing permission for inmates to keep hair oil and toothpaste and cancelling exercise periods on alternate days for no apparent reason. Inmates complained steadily of contaminated food and denials of prescribed medication. Three outspoken inmates, two blacks and one Mexican-American ,were accused of assaulting a guard and were put in isolation cells without clothing or bedding. One of the three wrote that he was "entangled in a situation of unknown proportions, not of my making, beyond my controlled comprehension, just like a lamb, I await

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[37]George Jackson wrote to an attorney investigating O Wing complaints for a possible affirmative civil rights action in June 1970:

> We have to fight, sometimes duels to the death, when the wrong doors get opened on the wrong shower periods . . . the pig sets people up this way. They put a little white guy on the tier with three of us by mistake today. I walked up to him, shook his hand . . . pig was so enraged that no fighting or killing took place, he screamed to me that I didn't have long to live.

Letter from George Jackson to Earl Hedemark, June 29, 1970, on file at the Prison Law Project, Berkeley, California.

[38]Claim of Thomas D. Harkins, Sr. & Kathleen Harkins v. State of California, filed with California Board of Control, February 11, 1971, copies on file at Prison Law Project, Berkeley, California.

the slaughter."[39]

After being removed from the strip cells, the other two, Edward Whiteside and Raymond Marquez, were denied their prescribed medication and were subjected to violent racial abuse. Their protests led to repeated tear gassings of these inmates in their cells.[40]

Throughout February and March 1971 inmates alternated between attempted discussion of their grievances with O Wing administrators and acts of physical resistance. In February 1971 a delegation from the Committee for Public Justice composed of Harvard psychiatrist Robert Coles, author and playwright Lillian Hellman, former U.S. Assistant Attorney General Roger Wilkins, and other prominent persons visited Soledad. Dr. Frank Rundle, the Soledad staff psychiatrist who worked against impossible odds to try to remedy the destructive effects of lengthy confinement in the Adjustment Center, met the group and took them on a tour of O Wing before prison officials could launch their more tepid "open house" reception. An inmate described their visit as follows:

> Well today the people came who you had told me about but the Pigs knew about it a little too early because about 15 to 20 minutes before the People and Dr. Rundle were here they turned our water on to try and clean things up a little. But I feel they saw enough because all we had in our rooms were one blanket and a sheet, legal paper and a few other things . . . from the canteen. They saw boxes and boxes full of garbage all along between our cells and us only in shorts and a tee shirt. What's funny about it is that we have only had a mattress two whole days since the first of February; one time when Dr. Rundle came to see us, and that was given us about one hour before and then again on the first few minutes of this visit . . . .[41]

The prison, as usual, counterattacked successfully in the media.[42]

Accumulated provocations in O Wing seemed to have grown beyond endurance, and many observers believed that "the slow burning fire of resentment" would soon ignite a full-scale prison uprising. In mid-May 1971, a Program Administrator, Kenneth Conant, was stabbed to death on the mainline. It was the prison's 10th death in 18 months. The entire prison population was "locked up" while tighter security rules were

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[39]*See* Sworn Statement of Francisco Albarran Buelna, February 20, 1971, in MAXIMUM SECURITY 166.

[40]*See Tear Gassings in March, 1971, Incidents Illustrative of Violence in Soledad's O Wing*, PRISON LAW PROJECT REPORT, *reprinted in 1971 Hearings* 273-79.

[41]Letter from Raymond Marquez to Fay Stender, February 22, 1971, in MAXIMUM SECURITY 52-53.

[42]The San Francisco Chronicle's Tim Findley found the situation optimistic, and admired the new program administrator Cal McEndree, calling him "progressive . . . may even succeed in closing down at least half of the Adjustment Center within the next year." San Francisco Chronicle, Feb. 24, 1971, at 18, cols. 5-6.

formulated. A new superintendent, Walter Stone, was brought in 1 month ahead of schedule to replace Fitzharris, who was to have left Soledad in July for a corrections deputy directorship in Sacramento. Within a week nearly 200 "potentially disruptive" inmates had been singled out and transferred to other institutions.[43]

The Soledad Brothers were sent to the Adjustment Center at San Quentin, as was Hugo Pinell. Other blacks on O Wing, including Earl Satcher, Meneweather, Whiteside, and Madison Flowers, were shipped to long term lock-up in Folsom's Adjustment Center. The most troublesome cases of mental disturbance went to the medical prison at Vacaville. Many of the younger inmates were sent to Deuel Vocational Institution (DVI) at Tracy, California. A total of 400 prisoners was transferred by July 1. Such was the "closing" of O Wing at Soledad.

At this time, however, Procunier and other officials began to warn that other institutions were showing signs of Soledad troubles. Procunier was reported as being determined to "wrest control of conspiracy" from convict groups and "outside manipulators."[44]

In November of 1973, after the stabbing of a guard at DVI, four California prisons were completely locked-down, and remained so until February 1974. A detailed description of the events, charges, and counter-charges which ensued would only drearily repeat the foregoing pages with only a slightly different set of characters, involving prisoners, prison-staff, lawyers, and press. There is no purpose in detailing the repetition of the 1970-71 events which occurred in 1973. Those of 1970-71 were detailed at such length in order to provide a factual base for the analysis which follows.

Before proceeding to an evaluation, it is important to note that as tension at Soledad receded in the summer of 1971, officials' claims about the extent of change at the prison greatly increased.[45]

Even as the Director of Corrections was taking pride in the purported closing of O Wing, approximately 35 Soledad inmates were being

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[43] *Id.* May 26, 1971, at 3, col. 1.

[44] San Francisco Examiner, July 4, 1971, at 6, col. 1.

[45] "As of July 1971 the Adjustment Center is no longer in existence . . ." the new superintendent Walter H. Stone told a British journalist, Simon Pleasance. "We have an Administrative Segregation Unit on the first floor of O-Wing now." Letter from W. H. Stone to Simon Pleasance, August 1971. Director Procunier explained the "cooling out" of Soledad as an example of the Department's advanced penological theories. "As part of the effort to find an answer to last resort lock-up" he wrote in a statement prepared for the *Hastings Law Journal*, "we have already been able to close the once-bulging maximum-security units at CTF Soledad." Unpublished manuscript submitted to *Hastings Law Journal* September 1971. Procunier's prepared statement for the House Hearings in October 1971 contains a paragraph on lock-up identical to the one in the *Hastings* manuscript, except that the sentence just quoted has been deleted.

detained there awaiting discipline or court trial for alleged in-prison offenses. The Adjustment Center had become a "county jail" detention center. Its essential routines ran on unchecked.

The sleight of hand performed over O Wing by the Department of Corrections may have been prompted by the legislative struggle waged throughout the summer of 1970 over the Dymally-Dunlap bill to regulate prison adjustment centers. Introduced by State Senator Dymally and Assemblyman John Dunlap, the bill restricted the practice of adjustment center confinement to the punishment of violent acts of misconduct only and provided basic procedural safeguards before such an assignment could be made. Under the bill an inmate could be placed in isolation only after approval by a prison hearing board that would include two prison staff representatives, an inmate observer, and a psychiatrist. The bill also provided that no prisoner could be held in an adjustment center for more than 30 days without a Superior Court hearing. It also outlawed most of the physical deprivations routinely practiced on O Wing and specified that adjustment centers should not be used for the confinement of persons having symptoms of major mental illness.[46]

The bill passed the Assembly, 42 to 32, on July 30, 1971, cleared the Senate Judiciary Committee in August, but was defeated in the Senate Finance Committee on a close vote during the final days of the legislative session. To counter the intensive support being mobilized for the bill by groups of prison lawyers, psychiatrists, social workers, and ex-prison organizations and others, the Department of Corrections argued that it had already met many of the bill's objectives—by reducing "lock-up", "closing" maximum security units, etc. After the August 1971 incident at San Quentin, however, in which three guards and three prisoners including George Jackson were killed, the Department changed its emphasis by arguing that the provisions of the bill would restrict Corrections' ability to deal effectively with agitators and emergency situations.

The campaign against adjustment center lock-up did not greatly ameliorate life in O Wing. For a brief time, public pressure did call forth a moderating response from Corrections officials. Yet the changes at Soledad, the removal of Cletus Fitzharris, the closing of X Wing, the inmate transfers, and the reclassification of O Wing, were but quickly applied symptomatic relief for the sickness of state-induced violence that grew beyond official ability to manipulate it. With Soledad simmering down, the heat shifting to San Quentin, the Adjustment Center Bill defeated, and legislative pressure relaxed, conditions on O Wing—invisibly and inevitably—deteriorated once more.

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[46]A copy of the proposed Dymally-Dunlap Adjustment Center Bill, A.B. 2904, S.B. 1610 is reprinted in 1971 *Hearings* 303.

In early 1973 a unified group of Chicano inmates were the center of attention in O Wing. On February 1, 1973 a petition signed by 30 O Wing inmates was sent out requesting Attorney Fay Stender to "see about investigation here" and to "represent us . . . and make sure that all about Soledad Prison O Wing is brought out and not covered up like always."[47]

The petition recites a litany of charges no less compelling for their repetitious familiarity:

> We the undersign have been the subject of cruel and unusual punishment, undue harrassment on the part of the administration and prison officers as well as mental pressure inflicted on our family and friends and on us, lack of warm and proper food, no proper medical attention, no heating much of the time, the confiscation of personal property, the denial of visiting privileges with our family and friends in the general visiting room on the basis of bogus disciplinary reports and filling our files with bogus charges to fit into the organizational stereotyping categories that C.D.C. has that does not help us convicts but condemns us and keep us behind concrete and steel, plus putting our lives in jeopardy, so as to get us killed or have great bodily harm inflicted on us, using us convicts as examples, when the newspapers and public hears of strikes or killings in "Soledad Prison" by giving us bogus disciplinary reports finding us *guilty* . . . so as to take public pressure off the administration and officers . . . all we ask is to be treated as human beings . . . .[48]

Today four prisons in California, Soledad, DVI, San Quentin, and Folsom, essentially constitute giant O wings. O Wing has in fact become the prison itself.

## II. Why O Wing Has Expanded: Implications For Prison Reformers

As O Wing filled up again in 1973 and X Wing reopened, the Department of Corrections sought increased funding from the legislature to plan and build new maximum security prisons in California. Despite public awareness, widely publicized trials involving prisoners, and other forms of political education, lock-up stood in little danger of being limited. The staying power of the prison bureaucracy was not matched by the reformers, and the organized campaign to dramatize the situation on O Wing in 1970-71 did not again materialize, either in early or late 1973 when lock-up took over all the northern California prisons. Two or three lawsuits were begun by groups new to prison litigation, and their

[47]Petition sent to Fay Stender from O Wing Inmates, February 1, 1973, on file at the Prison Law Project, Berkeley, California.

[48]*Id.*

success can not be predicted at this time. Lawyers from Public Advocates in San Francisco and the public defender's office in Marin County are now challenging aspects of lock-up in the federal courts.[49]

The 1970-71 effort had grown largely from the efforts of a relatively small number of people already brought together by the Soledad Brothers defense work. Spurred on by the energy and inspiration of George Jackson, capital defendant, powerful writer, and prison organizer of blacks, whites, and Chicanos, this group found some encouragement in the initial response of several liberal groups and investigations and was working with the momentum of a major political case.

By 1973 George Jackson was dead, the Soledad defense team scattered, the Prison Law Project—a group of lawyers and legal workers which had provided full-time legal services to prisoners—faced imminent closing for lack of funds,[50] and the few remaining sources of legal aid did not have the resources to take on anything but the most pressing individual cases.

Whatever limited restraint upon the administration of O Wing the 1970-71 effort had achieved no longer operated in 1973. No longer was there any reason for prison officials to make limited improvements in fear of massive reinvasion of O Wing by legal observors, investigating committees, the U.S. Civil Rights Commission, the Committee for Public Justice, reporters from the *New York Times* or *Washington Post*, or black or Chicano legislative caucuses.

The Soledad campaign did help to create a broader and more diffuse community of concern about prisons which, while unable to prevent the reversion of O Wing, did manage, in the spring of 1973 to stop passage of a million dollar state appropriation for the planning of new maximum security facilities. Reform forces also initiated a class action lawsuit which succeeded in obtaining 4 hours of outside recreation per day for prisoners in Folsom Prison's 4-A Adjustment Center.[51] They were unable, however, to obtain either that same "privilege" or three meals a day, rather than two, at San Quentin's Adjustment Center, where the prisoners who shared life in O Wing with George Jackson in 1970 remained incarcerated, some still confined there even after dismissal of

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[49]See Gonzalo v. Procunier, Civ. No. C-73-1422 SAW (N.D. Cal. filed December 27, 1973) (Petitioners' motion for appointment of Special Master pending). Counsel include private counsel and attorneys for Mexican-American Legal Defense and Educational Fund, NAACP Legal Defense & Educational Fund, and the Legal Aid Society of Sacramento County.

[50]The Prison Law Project did close, except for completion of its pending cases and referral services, on June 30, 1973.

[51]See Carter v. Craven, Civ. No. S-2388 (C.D. Cal. filed March 6, 1972) (Pending on defendants' motion for summary judgment filed February 15, 1973).

the indictment charging them with participation in the events surrounding Jackson's and the guards' deaths.[52]

With greatly reduced accessibility of funds, the prison lawyers who had organized the Soledad campaign, taken some of the additional Soledad cases themselves, and secured other private counsel for the trials of the Soledad prisoners charged with assault and murder of guards in 1970-71, were unable to do much in assistance of the prisoners charged with assault and murder of fellow prisoners at Soledad in 1973. Even if such attacks, whether on guards or prisoners, are understood to be a response to the frustration, deprivations and terror of prison life, it is nevertheless worth noting that in 1970 these lethal assaults were between prisoners and guards, and in 1973 they appeared to return to the pre-1970 pattern of being between prisoners themselves (excepting the November 1973 incident at DVI). Again it is worth noting that the deaths of dozens of prisoners did not result in the increase of security measures as did the death of one guard in the DVI incident.

A note allegedly found beside Officer John Mills' dead body at Soledad on January 16, 1970 to the effect of "one down, two to go" was widely publicized, and then all mention of it stopped, and it was never produced despite a demand for it by the defense in the Soledad case. After the three black prisoners were killed in the O Wing exercise yard, three prison officials were killed at Soledad within the next 18 months, and several prison guards were assaulted in O Wing in the few months immediately after those prisoners' deaths. It will of course never be known if these incidents would have occurred at all had the persons

[52]An historical and precedent-making order was entered in this prosecution, against six inmates and attorney Stephen Bingham, by Judge Vernon Stoll, a retired judge sitting by appointment on the motion to dismiss the indictment (for murder, conspiracy, assault, and other serious charges) on grounds of unconstitutional selection and composition of the grand jury which indicted the defendants. Granting the motion to quash the indictment against the prisoner defendants, in an Order filed January 17, 1974, in People v. Bingham, No. 4094, Superior Court of the State of California in and for the County of Marin, Judge Stoll found that representatives from identifiable groups of which defendant prisoners were members were systematically excluded from the Grand Jury. The defendants urged that the "identifiable groups" within which various of them fell were: the blacks, the low wage blue collar class, the Chicanos or Latinos, and ex-convicts, and convicts. To the writer's knowledge, this is the first instance of a trial court granting such a motion in the United States. Prisoners have again contributed to general law; the defendants, however, remain in the Adjustment Center under conditions similar to those described in Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). The court found that the moving defendants (the prisoners) belonged to groups to which the means used by the grand jury selectors did not assure fair representation: "to wit, The Blacks, the Latin Americans, the blue collar working class and the young in the pool from which the Grand Jury was selected." The court noted both that Bingham had not joined in the motion, and that there was no evidence as to him belonging to "any identifiable group." The state has appealed the ruling.

responsible for the deaths of the black prisoners been charged, or even investigated, by the processes of the law. It is submitted that the entire cycle of terror, death, and violence which began in California's prisons in January 1970 might never have started or reached the proportions it has if evenhanded justice had been applied to the investigation of the deaths of the three prisoners shot from the tower of Soledad's O Wing yard on January 13, 1970.

With the diminished public interest after the original dramatic events had ceased, the prisoners at Soledad and other California prisons turned more to their own internal organizations for protection and solidarity. This move, a conscious extension of longstanding survival devices in the prison culture, was a realistic response to the indubitable truth that the reformers live outside and are free to abandon the cause, while the prisoners remain inside.

Prisoner organization appeared to provide the only promising instrument for the continuing expression of inmate needs. Yet these organizations had the fatal weakness of existing on the basis of administrative sufferance. Officials were able not only to turn one racial group against another, but to manipulate, through favors and their subsequent withdrawal, tensions between two organizations within the same ethnic group. This process enflamed tensions among the two leading Chicano organizations at Soledad in early 1973 and appeared to have spread throughout the entire California system by late 1973.

The repetitive cycle in Soledad's O Wing must call into question the efficacy of the reform techniques mobilized in 1970-71. It appears that the ambitious 1970-71 campaign had one major, continuing benefit: the liberation of an authentic prison voice expressing its grievances and its political vision. In addition, the public attention thus drawn to Soledad helped to obtain favorable verdicts in the several court cases and thus prevented outspoken, activist prisoners, most of whom were black or brown, from receiving additional and consecutive life sentences.

Yet the resources consumed by these court battles reduced the amount of energy available to undertake civil lawsuits attacking prison conditions generally, or to maintain a sustained educational effort in the state legislature.

The larger and more painful truth, however, is that the array of methods used to publicize O and X Wings is inadequate, both in the context and beyond the defense of the Soledad Brothers, as a means of dealing with what must be seen as the inexorable and inevitable conditions revealed in the 1970-73 history of O Wing.

These methods are insufficient partly because publicity has an inconstant quality. Press coverage can be gained for the defense of a charismatic figure like George Jackson but cannot be maintained for a set of conditions that shape the lives of anonymous convicts. Groups of

authors, psychiatrists, social reformers, and prominent politicians may still be persuaded to undertake investigations, call press conferences, or lend their support to fundraising activities, but it becomes increasingly more difficult to gain media attention for what is, after all, a repetitious story, unless novelty is provided by increasing the stature of each new group of mobilized celebrities. The quest for publicity all too readily becomes a diversionary activity, and in the process a fundamental truth is obscured: publicity itself is a false goal, except as an opening wedge which quickly must be supplemented with more powerfully sustained efforts of varying kinds.

Economic, social, and psychological interests are served by the prison system's present arrangements, and it is at best ingenuous to believe that simply making certain attributes of that system more visible will force changes in it. Truth, in modern America, yields few lightning bolts. In retrospect, however, it is understandable that publicity assumed its great significance for opponents of O Wing. Conditions there did indeed violate "elemental concepts of decency," and it was perhaps natural to assume, at first, that brutality on O Wing was a dark aberration which could be abolished once the fact of it became widely known.

In publicizing occasions of gross maltreatment, therefore, Soledad prison's critics certainly hoped that such horror stories might galvanize public officials into taking remedial actions that would ultimately do away with lock-up as a major penological tool. As with other forms of shock treatment, however, this one had some unanticipated effects.

Debilitating arguments ensued about the factual basis for the allegations, and these disputes took attention away from the essential issue that it is the brute fact of locking men up in cages and not instances of maltreatment during any given moment of confinement which violates the "primal rules of a civilized community."

It is obscurantism masquerading as empiricism that forces debate on such questions as whether contaminated food was possibly served on one date and not on another; or whether the denial of X-rays was inadvertent, ignorant, or malicious. Casting the issue in such a way leads directly to what might be termed the "investigative trap" of having endlessly to organize new proofs, new teams of prestigious individuals who could report that they had seen "for themselves" that reports of inhumanity and brutality were true. Publicity thus becomes turned on itself, and the reformers in the end are forced into publicizing not the conditions, but the credibility of the reformers' and others' observations of them.

When representatives of the Black Caucus visited Soledad, Procunier maintained that what they had seen and heard was "beyond belief." Yet in response to a request that he explain the persistence of

atrocity stories, he averred that "you either have faith in the system or you don't." In the end, therefore, credulity is in the eye of the beholder.

Moreover, falling into the investigative trap demonstrates the myopia induced by class barriers. By virtue of their station, prisoners are deemed untrustworthy, and so their accounts of their own experience in prison are generally not credited unless confirmed by some reliable outsider. But no outsider's view of prison life will be considered reliable by prison officials who continue, with only very are exceptions, to monopolize the media.

Three years of effort by prison reformers and activists directed specifically at the news media with explicit urgings that they not take administrators' words at face value produced little questioning as to whether the authorities' pronouncements were accurate or complete. The prisoners remained generally invisible, whether in O or X Wings or mainline, except as described by prison administrators, unless the numbers of suicides or a large-scale riot received public note.

The effort to publicize in 1970 what had previously been invisible was an attempt to elicit emotional responses based upon shock and outrage without offering an analytic perspective which would clarify the possibilities of change. The reformers did not then understand the relationship of O Wing and the Adjustment Center to the prison system. Why had O Wing existed for many years prior to 1970 and why does it exist, unchanged in all essential respects, today? It is difficult to lay bare the dynamics creating O Wing; access to the complete truth is barred by the secrecy with which administrators surround lock-ups, and also by the privileged communications between prisoners and their attorneys. In its role as a symbol of maximum security lock-up O Wing is at once an expression of the desire and need of the public to punish and cripple the convicted defendant as well as a response of prison administrators to the problems of maintaining order in the prison, an institution in which no one wants to live and where the ordinary frustrations of mainline life are severe, even to men[53] with extraordinary impulse control. Yet most of the men in prison only partially understand the totality of forces, internal and external, which brought them there. Under the indeterminate sentence in California, a prisoner does not

[53]The term "men" is used advisedly in this context; because although women are sometimes locked up, the long-term Adjustment Center confinement has not characterized treatment of women felons in California (with the possible exception of three or four prisoners). Observers view with alarm the proposed construction of a new maximum facility for women in California and the possible onset of a new harshness in the overall prison treatment of women in general. The special issues of emphasis on "behavior modification" and "intensive treatment units" in the women's prison in California and the close custody connected thereto, are beyond the scope of this article. *See* K. BURKHARDT, WOMEN IN PRISON (1973).

know when, if ever, he will be released. And this in itself breeds an uncertainty similar to and at times consisting of true terror.

An indeterminacy so lengthy; *e.g.*, 1 year to life, or even 6 months to 15 years, has aspects of destruction of the juridical body. This destruction has been compared to the breakdown in Germany which lead to the torture and murder of concentration camp prisoners in Nazi Germany.[54] The use of terror and other devices as a feature of American prisons and Nazi camps is a long-neglected study which might well be undertaken in law schools and research institutes.

In California, and probably elsewhere as well, inmates must construct a complex of hypocritical attitudes to present to the Adult Authority (*i.e.*, parole board) before they can entertain any hope of getting out. A perfect written record must be achieved. This means no disciplinary write-ups, perfect work attendance, and suppression of hostile attitudes toward guards. Submission to total control and acceptance of near-total deprivation must be manifested at all times. This must take place while the prisoner deals with a set of deep anxieties: fear of abandonment by his family, loneliness, fear of physical attack, or fear of seeing a crime, such as an assault on a guard or other in-prison offense, and being forced to testify against another prisoner with a possibility of retaliation.

The physical setting exacerbates these fears; it is crowded, continually noisy, inadequately heated and illuminated, and medical care varies from slipshod to grossly negligent. Assertion of a rebellious, cynical, or radical political view means additional years in prison. To control such a population, it is absolutely essential for the authorities to hold out the threat of a confinement so much worse that men will conform to all that is expected of them on mainline.

An O Wing may or may not be essential to achieving the purposes which society consciously expects and requires of its prisons, but an O Wing is central and essential to the operation and control of today's prisons given the conditions outlined above. Men get into O Wing for several different reasons. Some are overtly psychotic and cannot, in the most minimal sense, control their behavior on mainline. They assault others or break rules by being in the wrong place at the wrong time, or destroy property, etc. Some knowingly break some prison rule by gambling, borrowing money, making home brew, failing to work, assaulting a prisoner or guard, or attempting escape. Some express political beliefs and attempt to organize prisoners into unions, or into other groups to assert rights or interests. Some are aggressively homosexual. Some are passively homosexual and unable to defend themselves. Some have been

[54] H. ARENOT, THE ORIGINS OF TOTALITARIANISM (1951). See particularly the discussion of totalitarianism in power at 404, 420 and *passim*.

convicted of crimes (Sirhan Sirhan or Charles Manson for example) which are believed to warrant a high degree of security against possibility of attack by other prisoners, or punishment, for the offender.

Some are placed in O Wings in an administrative attempt to determine responsibility for an event such as an assault or a narcotics smuggling ring. By this common technique, the authorities hope to force confessions or get information through the pressures created by lock-up. Some inmates will not cut their hair, or refuse to conform to some newly imposed rule, thus suddenly striking a spark of defiance in a previously conforming prisoner. Some respond to provocations which have not previously led them to rule breaking or defiance. A racial insult, once quietly borne, now inspires a hot reply. Some prisoners on mainline have a sense of outraged justice and righteousness, which usually leads to expressions of attitudes and behavior bringing them to O Wings.

Since few if any want to be on mainline (*i.e.*, in prison at all), O Wing is necessary to remind them of how terrible life will be if they do not conform to all requirements of mainline. It is the coercion of a life worse than that on mainline which compels human beings to endure mainline. Even with life in O Wing so devastatingly destructive, many people end up there. Out of approximately 22,000 male prisoners in California's penitentiaries, there are presently some 800 plus "long-term" lock-up prisoners in California's Adjustment Centers. Daily, more are being so classified.

Many prisoners arrive in O Wings as the result of a momentary loss of control, and once there, the breaking point is often reached on the 90-day initial stay, and the prisoner loses what self-control he previously had. He must demonstrate a "good attitude" to get out of O Wing, but often this is beyond him since he is "written up" every day and watched constantly.

The O Wing populations demonstrate a wide variety of human qualities, none of which is considered favorably by the authorities. The prisoners show a great need for emotional rapport and sustenance, and they place great emphasis on love and personal loyalty. They often show intense political and philosophical concentration. Many need to feel that they are serving a great and just cause; they need to give and receive love. Many manifest intense concern for "purity," demonstrate poetical and emotional ways of self-expression, and concentrate deeply on matters of pride, love, loyalty, and politics.

Many weaknesses are engendered and exaggerated by O Wing experiences; paranoia, lack of judgment, lack of sense of proportion, jealousy, touchy and overly hot senses of honor and betrayal, and low boiling points of rage all characterize prisoners in lock-up at various times. Few avoid some of these traits under those conditions.

The deteriorating behavior of many inmates under the pressures of

O Wing life and the militant revolutionary posture of others permits the prison administration to explain their continuation of O Wing practices as necessary for prison security on the few occasions when justification is required.

The terrible message of O Wing comes daily to the mainline prisoner struggling to find political expression. If it is necessary to have an O Wing to ensure a secure level of inmate conformity on mainline, one may ask if a similar coercion is necessary in the outside world to keep persons working at menial jobs or passively accepting the life which accompanies welfare and unemployment. Just as slavery or imperialism have provided solutions for some vexing problems in our society, so do prisons and their inevitable O Wings, albeit at a high price.

Exposure of the conditions in O Wing brought certain demands for change through the judiciary, the legislature, the media, and the increasingly well-organized ex-prisoner organizations. To the extent that O Wing and Soledad are anachronisms, persisting into a time when shocking and inhumane treatment of prisoners serves no deep or ongoing purpose of society, the demands and the movement for change hopefully will succeed in the foreseeable future. To the extent that such conditions and treatment are essential to the present purposes of our society, little if any change should be expected.

The preliminary signs are not optimistic as the Soledad effort of 1970-71 and the larger prison reform movement in California of 1971-73 are reviewed.

Although inadequacies of vision, personnel, analysis, and also inexperience in politics may explain the failure in both instances, this type of explanation for the failure to limit or restrict lock-up will be tested when the results of a third such effort are assessed. Consisting of a more broadly based alliance of prisoner and ex-prisoner organizations, more prestigious lawyers and reform groups, and a smattering of educated public and legislators, some current efforts at reform are now underway in California. It is far too early to evaluate these efforts, but they arise at a time when the media is extremely unfavorable toward prisoners and almost half of California's prison population is under some form of lock-up.

Since so much is hidden in prisons, and since the press often prints at face value the statements of the prison authorities, analysis of all efforts at prison change and of the prison situation itself must include the details of life as perceived by the prisoners. If self-congratulatory literature or ringing phrases from court orders or reform bills are relied upon to convince ourselves that change has occurred, there is little point in becoming concerned or involved with the problem at all. The lawlessness of corrections and the belief that it is beyond the law are outside

the scope of this article,[55] but a substantial portion of this lawlessness consists of deliberate failure to implement court orders.[56]

This lawlessness contributes to the terror of prison existence and permits prisons to serve deeper psychological functions for society than are generally perceived. The lawlessness of prisons is intimately related to the total lock-up which O Wing epitomizes. Not accidentally or coincidentally, while prisons generally have a higher nonwhite population than the general society, O Wing and lock-ups in California and elsewhere have a higher nonwhite population than that of mainline.[57]

That familiar trio, terror, lawlessness, and race, again surface in O Wing and in California's locked-down prisons, and a closing of O Wing in the near future is unlikely. The question to which lawyers and others seeking to understand O Wing must address themselves is both hard to find and hard to confront. But surely we must assume that these horrors serve more than a passing purpose, since they seem so resistant to change. When the purpose can be described and understood, strategies for change will have more meaning, and can be more appropriately designed.[58]

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[55]*See* Greenberg & Stender, *The Prison as a Lawless Agency,* 21 BUFFALO L. REV. 799 (1972).

[56]See paper on enforcement, implementation, and monitoring of court orders in prison cases, prepared by Linda Singer of the Center for Correctional Justice, Washington, D.C. for the Conference on Corrections, January 30-31, 1974 at the Academy for Contemporary Problems (Battelle Institute), Columbus, Ohio. The papers given at this conference are in preparation for publication by the Academy.

[57]See Complaint in Carter v. Craven, Civ. S-2388 (C.D. Cal., filed Mar. 6, 1972).

[58]This article has not taken up the myriad of cases recently decided and now pending dealing with conditions in prison and "due process" litigation, seeking to bring due process safeguards and procedural standards into the prison-parole process. Numerous law review articles and some textbooks are now available discussing the prison litigation explosion of the last decade. An excellent discussion of the inhospitability of the California state courts to prison litigation may be found in Bergesen, *California Prisoners: Rights Without Remedies,* 25 STAN. L. REV. 1 (1973).

Since the standards by which the constitutional prohibition against "cruel and unusual punishment" is measured are no less than "the evolving standards of decency of a maturing society," Trop v. Dulles, 356 U.S. 86, 100-01 (1958), it is appropriate to investigate and attempt to understand those standards before undertaking an analysis or explanation of why prisoners' lives and conditions remain as bad or worse than before the recent spate of litigation. It may well be that the immediate period is the dark before the dawn. The author in no way means to discourage litigation. However, it is submitted that litigation alone, without a more intensive analysis of the phenomenon of prisons, prisoners, and keepers in our society, is not likely to bring about real change.

The author has previously suggested that the political question inherent in the prison problem might be phrased as follows:

How can those desiring it change an institutional practice which:

1) generates profit for drug and other medical companies;

2) provides economic and life-time job security for a bureaucracy which from

top to bottom would have difficulty holding or competing for other jobs in other areas in American life;

3) superficially (at the moment of sentence) solves the problems of crime in the street and of the need for punishing those who cannot survive in our competitive, technologically fearful society—at the same time pretending to help them and removing them from the immediacy of our senses and consciousness;

4) permits "law and order" politicians to run for and win office on the "issue" of crime and its control, and further to command hundreds of millions of dollars in "research" and "improved law enforcement" funds, with the patronage and empire-building inherent in these ever-increasing fundings;

5) hurts and cripples a non-voting, poor, and heavily non-white population?

Stender, Book Review of J. MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS, THE CONSPIRACY, Nov. 1973, at 6. (Publication of the Regional Office of the San Francisco Bay Area National Lawyers Guild).

# PSYCHIATRY IN CORRECTIONS: A VIEWPOINT

*Charles E. Smith, M.D.**

The role of psychiatry in corrections continues to be highly controversial.[1] While psychiatrists and some of their medical colleagues debate the proper place of psychiatry in medicine and society,[2] correctional administrators ponder the extent to which they can usefully employ psychiatric expertise in the conduct of their programs. Although some authorities have expressed the opinion that psychiatry can make important contributions to correctional treatment programs, the current involvement of psychiatry in corrections is very limited; its potential has yet to be effectively demonstrated.

A mid-nineteenth century North Carolina State Legislative Committee Report[3] provides an interesting perspective on the physician's role in the prisons. In defining the prison physician's responsibilities, this document states, "He shall make strict examination into the mental condition of every prisoner, and if he finds that the discipline or confinement of the prison or any other appreciable cause accounts for any prejudicial influence on the mind that he may discover, he shall order such change as he may deem best."[4]

It is apparent that the authors of this proposal were quite farsighted in their perceptions of the basic requirements for preventive mental health services for imprisoned offenders. It is doubtful, however, that any physician or psychiatrist employed by any prison system has ever been delegated the responsibility for such a program or the authority to carry it to completion. Furthermore, it is not likely that any single physician or psychiatrist could fulfill these responsibilities, even were he given the authority to do so. Nevertheless, most contemporary correctional programs appear to follow the model suggested in this early report in that they seem to take literally the suggestion that a single physician can provide all necessary services, without reference to the numbers of persons to be served, and the extent of health care needs to be fulfilled. This model of medical care should be discarded and replaced with health care programs which are capable of responding constructively to both the emergent and long term needs of the imprisoned persons.

Unfortunately, one finds little on the contemporary scene to sup-

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[1]Smith, *A Contemporary View of Psychiatry in Correction,* 25 FED. PROB. 16-17 (1961).

[2]Editorial, *"Quo Vadis, Psychiatry?"*, 226 J.A.M.A. 464 (1973).

[3]REPORT OF SENATE COMM. TO INVESTIGATIVE AFFAIRS OF PENITENTIARY, DOC. NO. 27, SESS. 1869-70, GEN. ASSEMBLY OF N.C.

[4]*Id.* at 7-8.

port the development of expanded comprehensive health services for prisons. The 1966 edition of the American Correctional Association's Manual of Correctional Standards[5] contains a chapter in which objectives and standards for health and medical services in penal institutions are suggested. In discussing staff allocation this document states:

> The basic medical staff for a penal institution of approximately 500 inmates should include the following: one full-time chief medical officer, one full-time psychiatrist, serving as assistant medical officer, one full-time dental officer, one full-time psychologist, five full-time medical technicians—and a suitable complement of consultants in the various medical and surgical specialties.[6]

An additional medical officer and medical technician is recommended for every additional 500 to 1,000 inmates. While most medical authorities would endorse these standards, very few of the 230 adult correctional institutions in the country have health services which come anywhere near meeting these minimum requirements.

In 1967, the Task Force on Corrections of the President's Commission on Law Enforcement and the Administration of Justice published its 222-page report,[7] which makes no mention of either psychiatry or mental health services. Under a heading titled, "Treatment Services," there appears the statement, "Medical personnel, for example, are important."[8] This report goes on to note the shortage of "clinically trained persons" and suggests the advantages of "group methods" and "therapeutic community programs."[9]

In 1969, the Staff Report of the Joint Commission on Correctional Manpower and Training[10] questioned the usefulness of a "psychiatrically oriented clinical model in the approach to evaluating and treating offenders."[11] This report also stated that "many of the other concepts of mental health, such as emotional immaturity, character disorder, sociopathy, and so on, were exceedingly slippery handles by which to open doors to successful correctional methods."[12] The authors of this report would further diminish the need for psychiatry in correctional institutions by diverting various classes of mentally ill offenders out of

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[5] *Health and Medical Services,* in AM. CORRECTIONAL ASS'N, MANUAL OF CORRECTIONAL STANDARDS 436 (3d ed. 1966).

[6] *Id.* at 439.

[7] PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, REPORT OF TASK FORCE ON CORRECTIONS 50 (1967).

[8] *Id.* at 51.

[9] *Id.* at 52.

[10] STAFF REPORT OF JOINT COMM'N ON CORRECTIONAL MANPOWER AND TRAINING 69 (1969).

[11] *Id.* at 71.

[12] *Id.* at 39.

prisons into other treatment facilities, which are not specifically identified.

The 1973 report of the Task Force on Corrections of the National Advisory Committee on Criminal Justice Standards and Goals[13] also recommended diversion of certain mentally ill offenders to "mental health facilities." This report, however, recommends that correctional agencies provide psychiatric treatment for "emotionally disturbed offenders," certain drug abusers, and so called "recalcitrant offenders."[14]

The foregoing statements are illustrative of the lack of a consistent policy regarding the place of psychiatry and mental health services in corrections. Most observers would agree that the present overall involvement of psychiatry in corrections is very limited, and rather tentative in its conceptual design. At last count, only 26 of the 230 adult correctional institutions in this country could be identified as having specific treatment programs for mentally disordered offenders.[15] With few exceptions, each of these treatment programs had the services of only one full-time psychiatrist and perhaps one or two more working part-time. It is no surprise that the combined efforts of this small number of practitioners in a relatively few small, widely dispersed, and essentially unrelated programs has failed to have any substantial impact on major correctional problems such as recidivism, or even the narrower problem of providing effective treatment for emotionally disordered and mentally ill offenders.

If the place of psychiatry in corrections is in question, it can also be stated that the place of corrections in society is also unclear. As with many social welfare issues today, there is a remarkable polarization of viewpoints regarding the treatment of offenders. At one pole there is the philosophy of individualized treatment marked by humanistic and compassionate concerns. At the other end of the spectrum, there are proposals marked by coercion and repression based upon the ancient, but nevertheless popular theory, that certain and swift punishment will serve the best interests of control, deterrence, and correction.

Advocates of individualized treatment recommend expanded use of community treatment resources under the auspices of parole and probation with less use of institutional confinement. They propose that certain classes of offenders be diverted from the criminal justice system to other social or medical agencies. Among those who could be selected for

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[13]National Advisory Comm'n on Criminal Justice Standards and Goals, Report on Corrections 373 (1973).

[14]*Id.* at 375-76.

[15]W. Eckerman, A Nationwide Survey of Mental Health and Correctional Institutions Providing Comprehensive Care for Adult Mentally Disordered Offenders 13 (1970).

alternative treatment are the perpetrators of so called "victimless crimes" such as some drug and alcohol abusers, prostitutes, gamblers, vagrants, and certain adult homosexual offenders.[16] To assist in making these determinations it has been recommended that increased use of pre-sentence diagnostic study programs be made, and finally, that similar diagnostic resources be employed as an adjunct to the judicial determination of dangerousness, with the burden of proving dangerousness placed upon the prosecution.

At the opposite pole there are proposals for the continuation of the death penalty along with mandatory minimum sentences for certain classes of offenses, and the elimination of the insanity defense to make sure that no one "escapes" punishment. Also, increased use of plea-bargaining is recommended in order to expedite the work of the court in meting out sentences. Finally, some proponents of these procedures also recommend "preventive detention" of individuals who may be administratively determined to be dangerous in hearings which place the burden of proving non-dangerousness upon the accused.[17]

It is apparent that there are many ways in which these two sets of proposals are essentially incompatible one with the other. This being the case, it is clear that the future of individualized treatment lies in the balance, its fate awaiting the dictates of public policy. In a democratic society, one hopes that public policy will be shaped by both humanistic and practical concerns, rather than by a philosophy which allows desired ends to be compromised by available means.

While it is generally agreed that the successful attainment of desirable institutional goals requires public support and social approval, it is only in recent years that constructive efforts have been made to achieve these necessary ends. We no longer expect the public to influence the conduct of institutional programs on their own initiative. Instead, we now endeavor to inform the public as to what they should expect of institutions, in the hope that they will eventually demand the same. In the meantime, prison administrators do not have the wherewithall to implement desirable program innovations, including psychiatric services, and many take refuge in the rationalization that they could not purchase such programs even if they had the funds because of the dearth of available personnel and related resources. Unfortunately, no one can seriously question this assumption as long as funds are, in fact, not available, though one might well speculate over the possibility that personnel could be found if the commitment to employ them were more real than hypothetical.

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[16]*Crimes without Victims—A Policy Statement*, 17 CRIME AND DELINQUENCY 58 (1971).

[17]Smith, *Recognizing and Sentencing the Exceptional and Dangerous Offender*, 35 FED. PROB. 8-10 (1971).

Meanwhile, a small but vocal group of psychiatrists continues to challenge penal administrators and other influential persons to obtain financial support for a variety of psychiatrically oriented intervention programs, some of which would involve wider applications of individualized treatment, and most of which can be viewed as desirable additions to correctional systems. A few others actively espouse the cause of prison reform, hoping that a wider public dissemination of the manifest evils of prisons will eventually result in changes. For example, Menninger states that we label persons as "criminal" and then "force them through an experience that is soul-searing and dehumanizing."[18] He goes on to refer to "our present stupid, futile, abominable practices against detected offenders" and states that we have a system that attacks criminals "as if they were the embodiment of all evil."[19] Only time can tell whether this approach will eventually lead to salutary changes in prison treatment programs. In the meantime, one might fairly conclude that prison administrators who do not react defensively to this kind of criticism are not human.

In considering obstacles to the development of mental health services in correctional institutions, one cannot overlook some of the unrewarding features of the practice of clinical psychiatry. No doubt, some of these factors have contributed to the steadily declining interest in institutional practice which has been observed over the past several decades or so. Commenting on this trend, Kubie has observed that clinical work with patients is painful; that the attainment of clinical maturity of judgment is difficult and finally, that these difficulties are not eased by the prevailing tendency to undervalue clinical skills. Under these circumstances, he feels that developing physicians are inclined to find the areas of research and academic medicine more attractive than clinical practice, particularly that which may be institutionally based.[20]

Garber has observed that declining interest in clinical practice results in fewer "patients" being seen by physicians.[21] In prisons, where there is a dearth of trained clinicians, other categories of "helping" personnel have moved into the vacuum, often with an "anybody can do anything" philosophy. Sometimes it is difficult to ascertain whether the benefits of these new treatment efforts are more illusory than real. In any event, it remains to be seen whether these newly discovered therapists will find more enduring rewards than their more traditional counterparts.

It is fundamental that psychiatric treatment programs be based

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[18]K. MENNINGER, THE CRIME OF PUNISHMENT 9 (1968).
[19]*Id.*
[20]Kubie, *The Retreat from Patients,* 24 ARCH. OF GEN. PSYCHIATRY 98 (1971).
[21]*Id.* at 106.

upon concepts of individualized treatment with equal opportunities for all to receive an equivalent quality of service. Such programs are designed to foster closer relationships between the donors and recipients of treatment services, to facilitate accurate diagnoses and optimal understanding and collaboration in the treatment process. In order to treat a patient effectively, a doctor must get close enough to his patient to know him and his problems, and to enlist his confidence and active participation in the healing process.

On the other hand, custodial programs which are designed to preserve discipline and order require the maintanance of some distance between those who are trying to preserve order and the individuals whom they seek to contain. Most custodial programs rely heavily on standard operating procedures, which limit opportunities for individual choices and initiatives and reduce individual needs for decision making. The offer of tangible rewards for conformity reinforces dependence and further inhibits individual initiative. Thus, we observe that the requirements for custody and individualized treatment are not always compatible, and successful implementation of either custodial or treatment programs may eventually require that one be compromised to the other, at least to some extent.

The practice of medicine has always been beset with a series of ethical problems, many of which remain unresolved today. Among the more familiar issues are those having to do with the preservation of confidentiality, the requirement that patients be informed of the risk and consequences of proposed treatments, the right to indemnification for malpractice, the right to be treated, and the parallel right to decline treatment. In the closed institutional setting, where the patient is served by a state-employed physician not necessarily of his own choice, the physician-patient relationship is subjected to a unique set of strains and tests. During this time when civil libertarian activists are busy raising questions about the possibility of abuse of administrative discretion and questioning the propriety and applicability of certain treatment methods, the defense of psychiatric treatment programs has become even more difficult.

Many of these conflicts are epitomized in the current intense dispute over experimental treatment methods such as psychosurgery in the treatment of imprisoned offenders. No doubt, there is reason to wonder if some researchers may not have regarded prisoners as second class citizens, the conditions of whose imprisonment include coercive elements which may be exploited to good advantage in the solicitation of "volunteer" subjects for experimentation. Those researchers who may have done this justly deserve the criticism which has befallen their injudicious efforts. Meanwhile, it is unfortunate that the good name of

science has been scapegoated because of these apparent abuses of discretion and power.

A recent Michigan case[22] offers a hopeful precedent for both the physician and the correctional institution administrator on the question of the applicability of psychosurgery and other experimental treatment methods to individuals who are confined involuntarily. In this landmark decision the court ruled: "Psychosurgery should never be undertaken upon involuntarily committed populations, when there is a high-risk, low-benefit ratio as demonstrated in this case. This is because of the impossibility of obtaining truly informed consent from such populations."[23] Because of the experimental nature of the treatment and the lack of medical knowledge on the subject, the court found that knowledgeable consent was literally impossible. With regard to the voluntariness of consent in this context, the court stated, "It is impossible for [an involuntarily detained mental] patient to be free of ulterior forms of restraint or coercion when his very release from the institution may depend upon his cooperating with the institutional authorities and giving consent to experimental surgery."[24] Finally, the court questioned the State's interest in performing psychosurgery and concluded:

> Intrusion into one's intellect, when one is involuntarily detained and subject to the control of institutional authorities, is an intrusion into one's constitutionally protected right of privacy. Before a State can violate one's constitutionally protected right of privacy and obtain valid consent for experimental psychosurgery on involuntarily detained mental patients, a compelling State interest must be shown. None has been shown here.[25]

Almost contemporaniously with the publication of this opinion two prominent proponents of the use of brain surgery in the treatment of aggression have concluded that "psychiatric neurosurgery should never be performed on persons in any context in which they are under the jurisdiction of a court as the result of alleged criminal activity."[26] It is to be hoped that all professionals will adopt this position so that this question may be laid to rest. At the same time, continuing attention must be given to the ethical and sociopolitical implications of the use of a variety of other experimental behavior modification techniques on members of involuntarily confined populations, particularly when risks and benefits are uncertain.

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[22]Kaimowitz v. Michigan Dep't of Mental Health, 42 U.S.L.W. 2063 (Wayne County Cir. Ct., Mich. July 10, 1973).

[23]*Id.*

[24]*Id.* at 2064.

[25]*Id.*

[26]Mark & Neville, *Brain Surgery in Aggressive Epileptics*, 226 J.A.M.A. 772 (1973).

In considering the future of psychiatry in corrections it seems appropriate to suggest that psychiatric interventions should be determined by the primary role of psychiatrists, which is to function as physicians whose task it is to diagnose and heal illness and to ease human suffering. While no one can aspire to the eradication of all human suffering, it is reasonable to hope that something can be done to ease the most obvious human suffering. Toward that end, psychiatrists should be called upon to develop and implement programs within prisons to identify and treat those prisoners who are most obviously mentally ill. For those mentally ill prisoners who cannot be adequately treated within prison facilities, alternative resources must be developed.

No one knows the extent of the suffering of the mentally ill in prisons, nor the weight of the burden which the mentally ill impose upon the prison system. It has been estimated that at least 20 percent of any representative state prison population will be found to have some demonstrable emotional or mental illness employing usual diagnostic criteria and methodology.[27] To get some idea of the magnitude of this problem, consider the North Carolina prison system where there are about 10,000 prisoners in confinement any day of the year, and where approximately 13,000 commitments were received last year. If the 20 percent prevalence rate for mental disorder is applied to this population, we find that the system received at least 2,600 prospective mental cases last year or about 10 each working day. From experience, it is known that a caseload of this magnitude will provide material for several thriving outpatient clinics and perhaps a small mental hospital. For the most effective handling of this problem, I would recommend the establishment of suitably staffed mental health clinics within penal institutions.

Another highly productive way of discovering and dealing with mentally disordered offenders involves the use of pre-sentence diagnostic study procedures.[28] These study procedures permit the diagnosis of mental disorder prior to the imposition of final sentence so that courts can prescribe treatment programs which are tailored to fit the individual needs of mentally ill, as well as other problem offenders, who are found to require more than those treatment resources which are available in conventional prison programs.

Within the clinical programs which are established to provide treatment for needful mental cases among the prisoner population, the staff can also implement behaviorial science training programs for the benefit of the various classes of institutional personnel involved in the correc-

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[27]Guttmacher, *The Psychiatric Approach to Crime and Correction*, 23 LAW & CONTEMP. PROB. 633, 635 (1958).

[28]Smith, *Psychiatry in Corrections*, in FUNDAMENTALS OF CRIMINAL BEHAVIOR AND CORRECTION SYSTEMS 288-90 (G. Cull & R. Hardy ed. 1973).

tional process. These learning opportunities should be available to all who can be appropriately involved. For instance, medical students and psychiatrists in training can have useful learning experiences in these settings. Staff psychiatrists should also be involved in continuing educational activities to enhance their knowledge and to keep them abreast of new and emerging developments. Those providing direct services to prisoners within the institution, as well as those involved in administration, can benefit from exposure to training in this area. While there is continuous debate as to whether such training should be focused on higher echelon prison management personnel or on line officers, it seems that there is an emergent need for line officers to learn better ways of dealing with and controlling emotionally and mentally disturbed prisoners than billy clubs, high pressure water, and mace.

Finally, to achieve a balanced program, the mental health services should be involved in research and evaluation. In most prison systems it is probable that the only potential for developing a useful model for research and evaluation lies somewhere within the health services organization, be it ever so rudimentary. These health care units need to keep abreast of social developments and trends in order to fulfill their function at anything near an adequate level. Those who provide these services must recognize the needs and attitudes of their consumers and they must contribute to the development of acceptable programs responsive to these needs.

In devising approaches to the solution of these difficult problems, I would suggest that we be guided by the humanistic philosophy of the late Sir Norwood East, a noted British psychiatrist, who stated:

> However this may be, our part must be carried out in the spirit of scientists who are able to take long views and perceive the shape of things to come, who are concerned with men and women and the naked facts of life and living as well as with the inexorable realities of disease and death, who are willing to serve both State and lawbreaker with all the energy and goodwill of our humanistic tradition, and who, in spite of disappointments and rebuffs, maintain an abiding faith in man's usefulness to man. Moreover, as trustees of progress and truth we must not let our legatees remind us of the "Writing On The Wall" for "The Moving Finger writes; and, having writ, Moves on . . . ."[29]

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[29]N. East, Society and the Criminal 25 (1951).

# MISSISSIPPI'S PRISON EXPERIENCE

*David M. Lipman**

"The degree of civilization in a society can be judged by entering its prisons."

*Dostoevsky*

"[P]resent conditions at Parchman are philosophically, psychologically, physically, racially and morally intolerable."[1]

## Introduction

Mississippi's penal history is one of exploitation and neoslavery punctuated by nominal reforms compelled only by public outcries and political prudence. This system now confronts modern concepts of rehabilitation with historical prejudices. Since the nascency of the system, the prevailing concern has been to maintain inmates without cost to the state; indeed, the aim has been to operate at a profit. Accordingly, attempts by other penitentiaries toward convict rehabilitation[2] have been largely ignored, and the Mississippi State Penitentiary at Parchman stands presently as a monument to the neglect and outrages which have historically characterized the state's penal system. Parchman retains even today the vestiges of slavery and avarice which have historically characterized it.

## I. Historical Background of Mississippi's Penal System

### *A. The Walls*

Early in Mississippi's history, a citizen who incurred the wrath of

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[1]Gates v. Collier, 349 F. Supp. 881, 892 (N.D. Miss. 1972) (District court quoting from a report by a consultant committee, engaged by the Mississippi State Planning Agency, the Law Enforcement Assistance Administration (LEAA), and the American Correctional Association which reviewed conditions at Parchman in 1972).

[2]As early as 1870, the correctional profession in its landmark declaration of principles presented to and adopted by the National Congress on Penitentiary and Reformatory Discipline proposed the ideal of nonpunitive, rehabilitative, and humane treatment that has been all but ignored throughout Mississippi's penal system's history. The National Congress on Penitentiary and Reformatory Discipline was the forerunner of the American Correctional Association.

his neighbors was dealt with in any number of arbitrary and imaginative ways, primarily because the state lacked a central detention facility for prisoners.

> In the absence of a central penitentiary, squalid county jails, serving mostly as places of detention, indiscriminately housed prisoners of all ages and classes. In at least one case the authorities, lacking an adequate jail, chained their prisoner to a tree.[3]

Indeed, a facility for confining prisoners was hardly necessary in view of the existing criminal code which provided "retributive rather than corrective justice,"[4] and whose severity taxed credulity.[5]

Eventually, a large sector of the citizenry became convinced that criminal penalties were entirely out of proportion to offenses; this sentiment was evidenced by the reluctance of jurors to enter unfavorable verdicts where defendants would receive particularly cruel punishment. In addition, correspondence received by governors during this era testifies to the concerted efforts of citizens throughout the state to secure executive clemency for vast numbers of convicts. These citizens generally implored state officers to temper criminal penalties in order that they correspond more reasonably to the particular crimes.

The urgency for a fundamental reformation of Mississippi's penal code was manifested by a struggle during the 1830's between reform forces and those who opposed the broad use of executive clemency. This was accompanied by a simultaneous upsurge in the level of lawlessness throughout the state. In an address to the legislature in 1831, Governor Gerard C. Brandon urged modifications of the criminal code, calling Mississippi's prison system one of the two worst in the nation, and asserting that the guilty frequently went unpunished because "jurors, softened by the growing humanitarian spirit, refused to condemn the hapless defendant to the merciless penalties decreed by law."[6]

While rehabilitation may have been foremost in the minds of humanitarians urging penal reforms, the crucial question for state officials was whether a prison could be not only financially self-sustaining, but ultimately a source of state revenue.

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[3]Thompson, *Reforms in the Penal System of Mississippi 1820-1850*, 7 J. MISS. HISTORY 51, 54 (1945).

[4]*Id.*

[5]Making little or no distinction between major and minor crimes, it decreed the death penalty for numerous offenses and exacted society's vengeance for other transgressions by branding the wrongdoer, publicly lashing him on the bare back, or forcing him to stand in the pillory as an example to wayward youth and as the laughing stock of those who passed.

*Id.* at 53.

[6]*Id.* at 54.

> [F]rom the very first agitation for its establishment and continuing to the present, an underlying economic emphasis—concerned more with a critical analysis of costs than with services—has been the most realistic key for the understanding of its operation.[7]

Definitive legislative action to establish a central prison was postponed because of insufficient funds until 1836 when the legislature appropriated $75,000 for construction of a penitentiary[8] comparable to that advocated by reformers and which combined rehabilitation with profitable labor. Built by convicts and situated at the present site of Jackson's New Capitol, the prison opened in 1840 with only 25 of its 150 cells completed;[9] but it provided convicts with decent food and clothing and "moral instruction" to accelerate their reform.[10]

Apprehensions from some circles that a prison would be a financial liability were quickly dispelled by the profits realized from prison products,[11] and 10 years after its opening, "The Walls" was reportedly capable of producing $45,000 worth of goods annually, almost half of which redounded to the economic benefit of the state.[12]

Shortly after the penitentiary opened, however, the cruelty which was to pervade the evolution of Mississippi's penal system evidenced itself. Four years after "The Walls" admitted its first prisoner, a special investigating committee determined that at least one inmate's death was the result of a beating by the superintendent. At that time, the legislature categorically proscribed beating and whipping,[13] a gesture of little significance in view of the numbers of documented atrocities visited on Parchman inmates even in recent years.

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[7]Foreman & Tatum, *A Short History of Mississippi's State Penal System*, 10 MISS. L.J. 225 (1938).

[8]Thompson, *supra* note 3, at 64.

[9]*Id.* at 65.

[10]*Id.* at 72-73.

[11]As part of the reformatory process, convicts were trained in a variety of skills and eventually the prison's labor force included carpenters, masons, wheelwrights, cobblers, and blacksmiths. At the inception of the prison shop program, losses were sustained as a result of the small number of prisoners and the initial investments in machinery, but rumblings of criticism were quelled as the state began to realize substantial profits from the program. Eventually, the prison's high level of productivity began to threaten organized mechanics who claimed wards of the state should not be allowed to compete with free laborers. In addition, the mechanics claimed the illegitimate competition was forcing laborers out of the state and expressed distaste at the prospect of associating professionally with ex-convicts. In response to these pressure groups and also in an attempt to ease Mississippi's dependence on northern producers, the legislature in 1846 converted prison shops into factories for the manufacture of the coarse clothing for slaves. *Id.* at 73-74.

[12]*Id.* at 74.

[13]It is interesting to note that the current statute "discourages" corporal punishment but does not forbid it. MISS. CODE ANN. § 47-5-145 (1972).

Despite the prison's inadequate heating, impure water supply, and crude sanitary facilities, the Penitentiary Report of 1855 characterized inmates as "cheerful, contented, obedient, faithful, and industrious."[14] If that description is accurate, it is a painful irony that imprisonment in "The Walls" over 100 years ago was more humane than incarceration today in the state facility at Parchman.

Regrettably, the commendable advancements in penal reform accomplished in Mississippi between 1820 and 1850 were among the casualties of the Civil War. As the tension which finally erupted in the Civil War heightened, sectional strife distracted attention from prison reform, and at the war's conclusion, Mississippi's prison system entered into its most contemptible and disgraceful period, when offenders were subjected to ineffable terrors under the notorious convict leasing system.

### *B. Convict Leasing*

During the period between 1860 and 1867 when every available resource was funneled into wartime expenses, little could be done to maintain or improve "The Walls." The prison was converted into a munitions plant in 1863, and to accommodate this mutation some prisoners were released to join the ranks of the Confederate Army, others were distributed to jails throughout the state, and the most intractable were transferred to Alabama's prison.[15] At the war's end, funds necessary to restore the penitentiary, which had been destroyed by Sherman's army, were not available, and Mississippi once again found itself without an adequate penal facility. An impoverished treasury, an acute labor shortage, and a population of prisoners which exceeded the minimal accommodations offered at "The Walls" provided ideal circumstances for the institution of a system of convict leasing.[16]

Therefore, in 1867 Governor B.J. Humphries approved a joint resolution[17] providing for convicts to be leased to individual contractors for work on railroads, levees, roads, or any enterprise with an interest in

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[14]Thompson, *supra* note 3, at 72.

[15]Foreman & Tatum, *supra* note 7, at 259.

[16]"A wave of destruction and an aftermath of poverty left the South helpless to deal with a crime rate which almost doubled after emancipation. . . . [T]he economic stringency of the post-Civil War days made [convict leasing] seem a necessity." J. EZELL, THE SOUTH SINCE 1865, at 365-66 (1963).

[17]A series of resolutions beginning in 1866 delegated an increasing share of the responsibility to the lessees and culminated in 1884 with an Act which leased the entire penitentiary to the Gulf and Ship Island Railroad Company. Two years later the legislature abandoned all pretense and appointed the Railroad Commissioners as Board of Control of the penitentiary. Law of Oct. 27, 1866, ch. 146 [1866], Miss. Laws 212, 213; Law of Feb. 21, 1867, ch. 509 [1867], Miss. Laws 735-36; Law of March 15, 1884, ch. 18, § 8 [1884], Miss. Laws 26-27; Law of March 17, 1886, ch. 25, § 7 [1886], Miss. Laws 77.

leasing.[18] With provisions requiring the convicts' consent in writing, and prohibiting work which might endanger prisoners' health, the system appeared the most acceptable of a number of unsavory options, but tacitly accepted cruelty and abuse soon pervaded the convict leasing system and assured it a place as one of the most nefarious schemes ever countenanced by a "civilized" society.

It is clear that the resemblances between the convict leasing system and slavery are not illusory. Insidious racism has been and remains a distinguishable element of Mississippi's penal system. Prior to the Civil War, racial classification was rarely a problem within jails or the state prison, primarily because the preponderance of convicts were white.[19] Imprisonment was not viewed as an acceptable punishment for offenses by slaves, both because slaves would hardly have considered it a punitive measure, and because the inconvenience of their absence from work outweighed the remedial effect for the offender. In lieu of imprisonment, slaves were corporally punished according to their crime.[20]

With the emancipation of slaves, other methods of regulation were devised and implemented. The resulting racial demarcation quickly spread to the prisons:

> The general method of handling prisoners in the various jails was to place them in the municipal chain gang for work on the streets. Even the Negro women were often included in such groups. In the black-belt towns these chain gangs quickly assumed a racial character. The feeling that no white man should be included in them caused mayors to remit fines or white citizens to collect funds for their payment.[21]

Thus, the "freedom" which had been granted to blacks closely resembled slavery and lingering, pernicious traces of racial suppression found

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[18]Foreman & Tatum, *supra*, note 7, at 260.

[19]*Id.* at 256 n.6.

[20]As one historian has noted:

> Both in the mode and the kind of punishment there were several differences between the treatment of slaves and white persons . . . . The punishments of slaves by the State were of three other kinds. The whip was used on those convicted of either petit or grand larceny, with a maximum of thirty-nine lashes "well laid on," according to the language of the laws. At the other extreme, the death penalty was imposed for the commission of certain felonies, and it is noticeable that some felonies were punishable by death, if the criminal were a slave, but by lesser penalties, if he were a free white person. Finally, if a slave was convicted of a felony that was not capital, the law directed that he or she be burnt in the hand by the sheriff in open court and given such other corporal punishment as the court ordered. The penalty for the second offense was death.

C. Sydnor, Slavery in Mississippi 83 (1966).

[21]V. Wharton, The Negro in Mississippi 1865-1890, at 233, 235 (1947).

a willing accomplice in the convict leasing system.[22]

During the early period of convict leasing, prisoners were generally leased to wealthy speculators who were paid by the state for the convicts' maintenance and transportation. These speculators subsequently leased the convicts to planters and railroad and levee contractors who amassed fortunes by taking advantage of the free labor available through the system.[23]

Contributing in no small degree to the proliferation of the convict leasing system was Mississippi's notorious "pig law,"[24] which was largely responsible for an appreciable upsurge in the convict population, particularly the black inmate population, from 272 in 1874 to 1,072 at the end of 1877 when the law was finally repealed.[25]

Admittedly, the establishment of the convict leasing system can largely be attributed to compelling financial realities in Mississippi and can be viewed as the logical successor to slavery. Flourishing throughout the state, convict leasing enveloped every injustice of slavery and none of the restraints. The welfare of convicts was of negligible concern to sub-lessees, who were preoccupied only with extracting the largest measure of return possible at the most modest expense.[26] Recognizing that convict labor could be arranged more profitably for the state's exchequer, Mississippi eventually abandoned its policy of providing lessees with funds for the maintenance and transportation of convicts in favor of per capita rates charged for convict labor.[27] The inevitable effect of this action, of course, was that the state profited in proportion to the

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[22]"[Convict leasing] could only have flourished in an ex-slave state where ex-slaves made up the great majority of its convicts." Jones, *Penitentiary Reform in Mississippi*, 6 PUBLICATIONS OF THE MISS. HISTORICAL SOC'Y 120 (1902).

[23]For example:

> [A remarkable contract was made] with Edmund Richardson, planter, capitalist, and speculator, under which Richardson received almost absolute control over the prisoners of the state until November, 1871. Richardson not only gained the labor of the convicts without cost, but also received from the state $18,000 yearly for their maintenance and almost $12,000 for their transportation. There is little wonder that he came to be known as the greatest cotton planter in the world with a crop that in one year reached the amazing total of 11,500 bales.

V. WHARTON, *supra* note 21, at 237.

[24]Law of April 5, 1876, ch. 57 [1876], Miss. Laws 51-52. The "pig law" provided that the crime of stealing personal property valued at $10 or more or livestock at $1 or more was grand larceny, punishable by imprisonment up to 5 years.

[25]V. WHARTON, *supra* note 21, at 237.

[26]"The South's 'penitentiaries' were great rolling cages that followed construction camps and railroad building, hastily built stockades deep in forest or swamp mining fields, or windowless log forts in turpentine flats." C. WOODWARD, ORIGINS OF THE NEW SOUTH 213 (1951).

[27]Foreman & Tatum, *supra* note 7, at 262.

number of convicts being worked and that lessees redoubled their ruthlessness toward prisoners in order to continue realizing hefty profits.[28]

The most telling testament to the cruelty and abuses in convict camps can be found in reports such as that of a grand jury which in 1887 inspected Mississippi's penitentiary hospital.

> We found [in the hospital section] twenty-six inmates, all of whom have been lately brought there off the farms and railroads, many of them with consumption and other incurable diseases, and all bearing on their persons marks of the most inhuman and brutal treatment. Most of them have their backs cut in great wales, scars and blisters, some with the skin pealing [*sic*] off in pieces as the result of severe beatings.
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> Their feet and hands in some instances show signs of frost bite, and all of them with the stamp of manhood almost blotted out of their faces. . . . They are lying there dying, some of them on bare boards, so poor and emaciated that their bones almost come [*sic*] through their skin, many complaining for the want of food.
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> [W]e actually saw live vermin crawling over their faces, and the little bedding and clothing they have is in tatters and stiff with filth.[29]

Some protest to the system occurred in 1884 when the respectable citizens of Vicksburg were confronted with the horrid spectacle of a group of emaciated and disabled prisoners in transit from a convict camp to the penitentiary hospital in Jackson. The sight of the cadaverous and mutilated convicts was so abhorrent to the sensibilities of Vicksburg city officials that a covered wagon was provided to convey the group to the city's railroad station.[30] The Vicksburg incident prompted a legislative investigation, but although the subsequent report was published in newspapers around the state, it mysteriously disappeared from the legislature before being studied by state officials.[31] Such carelessness was typical of the prevailing indifference toward the atrocities of convict leasing. That vocal protest against this state sanctioned outrage was so slow in developing can be attributed to a myriad of factors, not the least of which was that the overwhelming proportion of those who suffered under the system were black.[32]

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[28]Jones, *supra* note 22, at 113.

[29]V. WHARTON, *supra* note 21, at 241, *citing Hinds County Grand Jury Report*, Jackson Weekly Clarion, July 13, 1887.

[30]Foreman & Tatum, *supra* note 7, at 262.

[31]*Id.* at 262-63.

[32]Southern exponents of the leasing system, . . . argued that 90 percent of the laborers were Negroes of the lower class who benefitted from being worked regularly. Also, since they were accustomed to outdoor life, this was more hu-

Excesses under convict leasing are clearly reflected in convict death rate statistics during the 1880's. The average annual death rate among Negro convicts in Mississippi from 1880 to 1885 was almost 11 percent, for white convicts about half that, and in 1887 the general average was 16 percent.[33]

When opposition to the lease system finally became effective, it was because small farmers saw it as an exclusive privilege of wealthy plantation owners and because the general public was appalled by the inhumanities of the system. In addition, sublessees saw their reputations becoming tarnished by what they perceived as "unjust and harmful criticism" of their employment practices.[34] Opposition to leasing culminated in 1890 when the legislature ordered the system eliminated by the end of 1894.[35] In the interim, an effort was made to procure areas of land for penal farms, and convicts were permitted to work only on state construction sites.[36]

In 1894, the legislature purchased large acreages in Rankin, Hinds, and Holmes Counties and established penal farms which rapidly began to register profits for the state. The three state farms, however, were not able to provide work for Mississippi's entire prisoner population. To compensate for the deficiency the state penitentiary board leased additional land from private plantation owners who retained supervision of their land, enjoyed the free labor of surplus convicts, and shared profits equally with the state. Despite these efforts to abandon convict leasing, it was not until 1906 that the system was entirely eradicated. This herculean task can be credited in large part to James K. Vardaman, whose efforts at penal reform occupied a significant portion of his gubernatorial career.[37]

### *C. The Mississippi State Penitentiary at Parchman*

Prompted by the fiscal success of its prison farms, the legislature

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mane and healthful than cooping them up within walls. The convicts were more reliable and productive than free labor.

J. EZELL, *supra* note 16, at 368-69.

[33]V. WHARTON, *supra* note 21, at 240. "These figures become more significant when they are compared with the percentages of deaths in six prisons in the Middle West in 1884, 1885, and 1886. These ranged from 0.51 percent to 1.085 percent." *Id.* at 241 (footnote omitted).

[34]C. WOODWARD, *supra* note 26, at 214.

[35]MISS. CONST. art. X, §§ 223-26. Sections 223, 224, and 225 forbade the leasing of penitentiary convicts. But section 226, in contrast to the previous sections, provided for the continued leasing of county jail inmates with only minor restrictions.

[36]V. WHARTON, *supra* note 21, at 242.

[37]Holmes, *James K. Vardaman and Prison Reform in Mississippi*, 27 J. MISS. HISTORY 229 (1965). Vardaman's progressive, humanitarian stance in the area of corrections was in complete contrast to his racism.

I believe every dollar invested for negro education under our present free school

in 1900 expanded the system to include the 14,000 acre Parchman plantation in Sunflower County, which has burgeoned to its present size of some 21,000 acres. By its brutal treatment of inmates,[38] Parchman has established a national reputation for inmate repression and degradation. Significantly, the criminal treatment of inmates which has plagued Parchman since its early years has been habitually accepted as necessary for efficiency, productivity, and profit. A legislative investigation in 1913 which uncovered a widespread pattern of administrative corruption "set the tone of future penal investigations in Mississippi,"[39] and penology assumed secondary importance to the amount of revenue generated for the state. In 1929 the HANDBOOK OF AMERICAN PRISONS observed that where all proceeds from prison labor return to the general fund and where prison administrators depend on legislative appropriations for maintaining the farms, there is little incentive for penal improvement.[40]

One aspect of prison life unique to Parchman and viewed by some as surprisingly avant-garde is conjugal visitation. Although some authorities date its origin as long ago as 1918,[41] it has become a formal practice only within the last two decades. Hailed by a substantial segment of contemporary sociologists and penologists as an innovative and sane method of normalizing the lives of incarcerated men, conjugal visitation at Parchman nevertheless clearly has its roots in the racism which always has pervaded Mississippi's penal system.

While conjugal visitation privileges are extended today at Parchman to every married inmate in good standing,[42] in its early years the

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system is an indefensible and unwarranted prodigality of cash. It is a crime against the white man who furnishes the dollar and a disadvantage to the negro upon whom it is spent. . . . Slavery is the only process by which he (the Negro) has been partially civilized. God Almighty created the negro for a menial—he is essentially a servant.

Governor's address to the Legislature, 1906.

[38]As C. Hopper noted:

> [Inmates] have worked from daylight until dark in the woods and fields of the plantation, frequently under the threat of floggings and a variety of "unofficial" techniques such as beatings with chains and blackjacks, and even shooting. Work has been the most important activity in the penitentiary and everything else overshadowed by it. Even medical attention at times has been unavailable to men at work in isolated areas of the plantation.

C. HOPPER, SEX IN PRISON 21, 22 (1969).

[39]*Id.* at 21.

[40]NATIONAL SOCIETY OF PENAL INFORMATION, INC., HANDBOOK OF AMERICAN PRISONS AND REFORMATORIES 527 (1929).

[41]C. HOPPER, *supra* note 38, at 52.

[42]Although both races may have the visitation privilege, there still is a considerable difference in the procedures as between blacks and whites.

> [F]or example, no visitors of any type are allowed in the living quarters for white men unless they are chaperoned. Yet truck loads of women are permitted

practice was reserved exclusively for black inmates, and marital status was not a criterion.

Considering that black inmates had historically been relegated to inferior quarters, more arduous work assignments, and generally lesser standards of treatment than their white counterparts,[43] it is not unreasonable to suggest that, in an attempt to quell potential insurrections, Parchman officials proferred visitation privileges to black inmates in order that they might more readily submit to their oppressors. As one camp sergeant observed in 1963, "If you let a nigger have some on Sunday, he will really go out and do some work for you on Monday."[44]

Professor Columbus B. Hopper of the University of Mississippi, after a decade of studying Parchman's conjugal visiting program, blithely acknowledged the importance of race in the origins of conjugal visitation.

> There can be little doubt of the significance of racial segregation in the initiation of conjugal visits at Parchman. The practice began in the Negro camps where the white staff members were tolerant of the inmates' sexual needs. Although the Negroes' position as members of the "lower caste" had its disadvantages, it did relieve them of the moral restraints which the white society imposed on all whites, including white prisoners. At the time Parchman was established, Negroes were typically viewed by white southerners as being "naturally" promiscuous and as having greater sexual needs. The white sergeants of Negro camps simply "looked the other way" in accommodating what they considered to be natural among Negroes. As the buildings used for conjugal visiting appeared in Negro camps and as the practice became more respectable, it was accepted in the white camps . . . And sex, being such a basic and persistent need among young males, is, of course, a factor to be taken into consideration when economic goals are given a place of prominence.[45]

Many of Parchman's institutional codes may be attributed to its fundamental character as a plantation.

> [S]ince the Mississippi State Penitentiary is built upon the plantation structure and performs the basic functions of a plantation, it cannot escape, at a general level, evidencing the essential patterns of interac-

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to enter the various camps for Negro men. Commercial prostitutes make their weekly visits to these camps . . . without any . . . examination. [Also] quarters are provided for these Negro women during their visits to the camps. During the day they occupy rooms on the basement floor of the central building.

*Id.* at 53.

[43]*See, e.g.*, Gates v. Collier, 349 F. Supp. 881, 887 (N.D. Miss. 1972).

[44]C. HOPPER, *supra* note 38, at 95.

[45]*Id.* at 79, 80.

> tion characteristic of the plantation system.[46]

Thus, the prison superintendent is successor to the plantation master, and prisoners are analogous to the slaves of by-gone eras. Under slavery, separate quarters were provided for the races, menial tasks were assigned to black men, and a racially disparate system of justice was imposed. Similarly at the Parchman plantation:

> inmates are assigned to the 12 major residential camps on the basis of race. Inmates are assigned to work details according to race . . . black inmates in some instances have been subjected to greater punishment or more severe discipline than have white inmates for similar infractions of penitentiary rules.[47]

The most distinctive "pattern of interaction" at Parchman relates to racial classification. Even Parchman's vocational training program, the prison's first attempt at rehabilitation since its creation, was originally designed only for inmates at the first offenders camp, an exclusively white camp.[48]

Race dictates every aspect of an inmate's treatment at Parchman from the most mundane to the most crucial. Every injustice which is perpetrated on the prison's inmate population is exacerbated for Parchman's black inmates.

Pursuant to legislation enacted in 1936, the Penitentiary Committee, composed of legislators appointed by the governor, is responsible for visiting the prison during each regular session to inspect and make recommendations for its operation. Despite this attempt on the part of the legislature to guard against penological abuses, the reports, some of which depict outrageous conditions at Parchman, have not prompted corrective legislation. The Report of 1936 discloses:

> At Camp B we found that there are 173 men and 105 beds and the bedding is in a deplorable condition. The men have had to "double up" considerably on single beds and many of the beds are not fit for any use whatever. . . . We do not think . . . that we can say anything that would be too bad about this Camp.[49]

Certainly, the surfeit of expert committee reports and litigation

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[46]*Id.* at 73.

[47]Gates v. Collier, 349 F. Supp. 881, 887 (N.D. Miss. 1972).

[48]BICENTENNIAL REPORT OF THE PENITENTIARY COMMITTEE (1968) (Miss. State Archives, Jackson, Miss.) [hereinafter cited as BICENTENNIAL REPORT]. The report notes, "The all-white first-offenders camp appears to be one of the most successful innovations of recent years." *Id.* at 7.

[49]REPORT OF THE PENITENTIARY COMMITTEE (1936) (located in Miss. State Archives, Jackson, Miss.).

involving Parchman renders incomprehensible assertions from any quarter of ignorance about conditions at the prison.

After more than 60 years of benign indifference to conditions at Parchman, public attention was focused there late in 1965, when 250 civil rights demonstrators from Natchez were detained in the prison's maximum security unit. In *Anderson v. Nosser*[50] the Fifth Circuit found the prison conditions and practices "sub-human" and violative of constitutional proscriptions against cruel and unusual punishment.

> On arrival all male prisoners were required to strip naked and all women prisoners were ordered to remove their shoes, stockings, sweaters, coats, jewelry, and wigs. All were compelled to consume a laxative and were deprived of all personal belongings, including sanitary napkins and medicines. The prisoners were then led to the cells. Up to eight persons were placed in each cell, which contained two steel bunks without mattresses or other bedding, a toilet without a seat, and a washbasin. There were no towels or soap and there was inadequate toilet paper. The temperature ranged from 60 to 70 degrees, the chill being aggravated by exhaust fans which blew intermittently on the occupants. Some of the men eventually were permitted to get their underwear, but others were nude for a period of 36 hours.[51]

No real justification for the treatment was offered other than that "the treatment was merely the standard operating procedure for the Maximum Security Unit."[52] Further contributing to Parchman's notoriety and infamy in recent years was a riot in 1968 which brought the prison highly unfavorable publicity. A legislative investigation followed, and the rather insipid report issued attributed the riot to: (1) criticism of penitentiary administration and policies by individuals outside the administration; (2) use of prison inmates as drivers; and (3) the change in the make up of the Penitentiary Committee.[53]

It is now acknowledged that at the time of the foregoing investigation, inmates were being summarily subjected to arbitrary beatings, whippings, sexual assaults, and a battery of inhumane tortures[54] compared to which the abuses under convict leasing pale in insignificance.

Of substantial culpability in Parchman's transgressions is the trusty system, a program whereby an inmate who has demonstrated his trustworthiness may be placed in a position of authority over other prisoners. It is clear that the trusty concept is the contemporary counterpart of convict leasing's "strawboss."

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[50]438 F.2d 183, 194 (5th Cir. 1971).

[51]*Id.* at 187-88.

[52]*Id.* at 193 (footnote omitted).

[53]BICENTENNIAL REPORT, *supra* note 48.

[54]Gates v. Collier, 349 F. Supp. 881, 889-90 (N.D. Miss. 1972).

If the trusty system was designed to reward meritorious conduct, it has hardly succeeded:

> Payoffs, favoritism, extortion, and participation in illegal activities have influenced the process of recommending and selecting trusties.
>
> Penitentiary records indicate that many of the armed trusties have been convicted of violent crimes, and that of armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders. There is no formal program at Parchman for training trusties and they are instructed to maintain discipline by shooting at inmates who get out of the gun line. . . . Trusties have abused their position to engage in loan-sharking, extortion and other illegal conduct. . . . The evidence indicates that the use of trusties who exercise authority over fellow inmates has established intolerable patterns of physical mistreatment. For example, during the Cook administration, 30 inmates received gunshot wounds, an additional 29 inmates were shot at, and 52 inmates physically beaten.[55]

Five years after *Anderson*, a University of Georgia study group commissioned by the Penal Institutions Legislative Study Committee to review Mississippi's penal system submitted its final report which included a limited examination of the Parchman farm.

> Two major factors dominate all phases of the program at Parchman. The first is the farm operation. Historically, and to a large extent today, the state has expected the penitentiary not only to be self-supporting, but also to produce a profit for the state. The second predominate [*sic*] factor is that the penitentiary is, in effect, operated by the prisoners. The dependence on armed trusties coupled with the legislative limitation on the number of civilian personnel, regardless of the diligence of the Superintendent and his staff, could lead to no other conclusion.[56]

Inadequacies in virtually every phase of Parchman's program were attacked in the committee's 68-page assessment of the prison. The report, in addition to recommending fundamental administrative reorganization, contained thinly veiled yet prophetic warnings that if significant changes were not made expeditiously to ameliorate conditions at the prison, Mississippi would soon find itself the object of reform-oriented suits similar to those which had been brought recently against penal systems of other states.[57]

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[55] *Id.* at 889.

[56] D. Brewer, Report to the Penal Institutions Legislative Study Committee 20 (1970).

[57] *E.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Hamil-

Confirming these conclusions was the report of a legislative committee also submitted in 1970 acknowledging that "the total atmosphere and actual operation of Parchman is completely enmeshed in the use of armed trusties or shooters . . . [and] is, for all practical purposes, operated by the prisoners."[58] Cautioning against the continued utilization of trusty guards, the committee predicted that "it is only a matter of time before the federal courts will order the complete abolition of the armed trustie [*sic*] inmate guard system . . . ."[59] Indeed, premonitions of judicially-imposed standards at the prison were proven accurate.

Only a month before the Fifth Circuit announced its decision in *Anderson*, the General Legislative Investigating Committee submitted to the Governor and Legislature its report concerning the death of a Parchman inmate, Danny Calhoun Bennett, who, according to prison records, died as a result of heat stroke. The report, which included a grand scale indictment of the trusty system, concluded that the inmate had been murdered.[60] This murder occurred during a work assignment supervised by J.D. Gilmer, a trusty.

> J.D. Gilmer was sentenced to Parchman in 1950 to serve a life term for murder and was paroled in 1960. In February, 1962, his parole was revoked and he was recommitted to the Penitentiary to serve another life term for the crime of rape. This is the character of the criminal, the trusty, who had direct and exclusive supervision of the work detail to which Danny Bennett was assigned on the day of his death.[61]

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ton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Holt v. Sarver, 309 F. Supp. 362, *aff'd and remanded*, 442 F.2d 304 (E.D. Ark. 1970); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[58]PENAL INSTITUTIONS LEGISLATIVE STUDY COMMITTEE, A STUDY OF ADULT AND JUVENILE CORRECTIONAL PROGRAMS IN THE STATE OF MISSISSIPPI 40 (1970). Only 2 years prior to this report, however, a legislative committee stated:

> To completely eliminate this weakness [inadequate control of trusties] would require the abandonment of the trusty system. This is financially impossible since the cost of replacing 400 to 600 trustys [*sic*] and half-trustys [*sic*] would be prohibitive. Generally speaking, this system appears to be satisfactory.

BICENTENNIAL REPORT, *supra* note 48, at 7.

[59]PENAL INSTITUTIONS LEGISLATIVE STUDY COMMITTEE, A STUDY OF ADULT AND JUVENILE CORRECTIONAL PROGRAMS IN THE STATE OF MISSISSIPPI 33 (1970).

[60]GENERAL LEGISLATIVE INVESTIGATIVE COMMITTEE, MISSISSIPPI STATE PENITENTIARY 62 (1971).

[61]*Id.* at 50-51. George McLaurin, convicted with Gilmer of the murder of Bennett, was reappointed to trusty status on the same day of his conviction on the personal order of Superintendent Thomas Cook despite a prison rule proscribing such a promotion within 90 days of conviction of a felony. Letter from Thomas Cook to George McLaurin, November 16, 1971, Gates v. Collier, No. GC 71-6-K, Exhibit 74, Deposition of J. Leland Vanlandingham, January 19, 1972.

Affidavits from inmates who were present during the beating which resulted in Bennett's death indicate that trusties were indiscriminately beating prisoners with the cognizance, acquiescence, and direction of the sergeant in charge of the work detail.[62]

What is most significant about the legislative report is that it challenged the legislature to remedy the savagery which prevailed at the state prison, beginning with the immediate abolition of the nefarious trusty system. If, up to this time, legislative indifference to conditions at Parchman can be excused on grounds of ignorance, after January 1971, when the committee's report was submitted, lack of documented and specific evidence about penological abuses was no longer a credible defense for inaction.

The foregoing investigations unquestionably served as a catalyst for the legislature's approval in April 1971 of a bill which would completely eliminate the trusty system by July 1974.[63] While the intentions of the legislature were presumably most noble, it cannot be gainsaid that, in view of the documented abuses inherent in the trusty system, the legislative response was half hearted at best.

Shortly before a federal district court ordered the implementation at the Mississippi State Penitentiary of measures intended to bring the prison into consonance with "contemporary concepts of decency and human dignity,"[64] a special consultant committee was empowered "to develop a preliminary plan to meet the immediate basic human needs of the inmate population."[65] Having conducted a comprehensive examination of the penitentiary, the committee observed in its final report that:

> [T]here are three basic philosophies so fundamental to the existing system, which continue to perpetuate the problems existing at Parchman today, that they cannot be ignored in this committee's report:
> (1) That the prison system must operate at a profit at any cost;
> (2) That armed inmate guards are acceptable and capable of insuring safety and security within the system; and
> (3) That security and control are insured through maintaining a high degree of fear within the inmate population.[66]

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[62]Significantly, 2 years prior to the Bennett murder, a psychologist noted after an interview with Bennett's sergeant, "I would hesitate to retain him in his present position of authority and responsibility and control over men." GENERAL LEGISLATIVE INVESTIGATIVE COMMITTEE, MISSISSIPPI STATE PENITENTIARY 71 (1971).

[63]MISS. CODE ANN. § 47-5-143 (1972).

[64]Gates v. Collier, 349 F. Supp. 881 (N.D. Miss. 1972).

[65]Transmittal letter for LAW ENFORCEMENT ASSISTANCE ADMINISTRATION CONSULTANT COMMITTEE, INTERIM REPORT ON MISSISSIPPI STATE PENITENTIARY at 2 [hereinafter cited as INTERIM REPORT].

[66]*Id.*

Testifying to the preoccupation with finances rather than with inmate rehabilitation are the minutes of monthly Board of Commissioners meetings. During a period of some 20 years, the minutes reflect that the attention of the board was absorbed with mercantile invoices and purchases, with few exceptions.[67] At one meeting in 1946, the board adopted Rules for the Government of Employees, which provided, *inter alia*, that laziness, carelessness, indifference, or inattention on the part of an inmate was tantamount to a violation of the rules; that no employee was to abuse or curse an inmate; and that no more than 15 lashes could be administered as punishment except in the presence of the superintendent.[68] Seventeen years later, the following paragraph was entered into the minutes:

> Since the moral and cooperative attitude of the inmates appears to be at the highest level in many months, the Commissioners agree with the Superintendent that punishment of inmates for the infraction of rules and regulations of the Mississippi State Penitentiary shall be restricted to the following measures; namely, taking away normal privileges and confinement in the Maximum Security Unit, and at no time will any employee be permitted to use the lash.[69]

Apparently, those proscriptions were paid little heed; the court in *Gates* found that trusties and other supervisory personnel were permitted virtually unchecked discretion in administering punishment to Parchman inmates.[70]

Consistent through the years, the legislature, while enacting grandiose (and unenforceable) proscriptions against mistreatment of inmates,[71] has retained as its foremost concern the financial solvency of the penitentiary; indeed, the legislature has decreed that the prison will operate "with the view of making the system self-sustaining."[72]

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[67]Penitentiary Board minutes (located in Miss. State Archives, Jackson, Miss.).

[68]*Id.* March 5, 1946.

[69]*Id.* November 12, 1963.

[70]Gates v. Collier, 349 F. Supp. 881, 889 (N.D. Miss. 1972).

[71]*E.g.*, MISS. CODE ANN. § 47-5-145 (1972).

[72]*Id.* § 47-5-1 (1972). The emphasis placed on productivity at Parchman is clearly indicated in figures reflecting amounts annually returned to the state's general fund in the last decade from the sale of penitentiary products.

| | |
|---|---|
| FY 1964 | $1,030,877.73 |
| FY 1965 | 1,025,602.40 |
| FY 1966 | 888,575.73 |
| FY 1967 | 1,108,750.85 |
| FY 1968 | 1,565,360.79 |
| FY 1969 | 1,290,863.34 |
| FY 1970 | 834,559.97 |
| FY 1971 | 1,188,012.05 |
| FY 1972 | 1,188,126.38 |

As intolerable conditions continued to exist at Parchman the vehicle to initiate reform shifted from the unresponsive Mississippi Legislature and governor's office to the lap of the federal courts. On February 8, 1971, a class action suit was filed by Parchman inmates against the superintendent of the penitentiary, the members of the Mississippi Penitentiary Board and the Governor. *Gates v. Collier*[73] was born.

## II. Gates v. Collier

### A. *Procedural History*

On February 8, 1971, *Gates* was commenced as a class action on behalf of all persons who were or who might later be incarcerated in the Mississippi State Penitentiary. The plaintiff-inmates alleged that their confinement at Parchman by the State of Mississippi deprived them of rights guaranteed by the 1st, 8th, 13th, and 14th amendments to the United States Constitution and by sections 1981, 1983, 1985, and 1994 of Title 42 of the United States Code. Plaintiffs sought an injunction against the deprivation of their rights during their incarceration and against certain practices and conditions existing at Parchman. Plaintiffs also sought a declaratory judgment that the deprivation of such rights and the continuation of such practices and conditions were unconstitutional.

Shortly after commencement of the suit, the United States District Court for the Northern District of Mississippi ruled that under Rule 23 of the Federal Rules of Civil Procedure the action was properly maintainable on a class basis, there being two overlapping classes of plain-

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State of Mississippi Annual Reports of the State Auditor of Public Accounts 63 (1968). The profit for fiscal year 1973 of approximately $1,384,000 was announced by Governor Waller on December 19, 1973. Clarion-Ledger (Jackson, Miss.), December 20, 1973, at 1, col. 7.

Citing Mississippi's uncommon practice of diverting revenues gained from its farming industry to the state's general fund, E. Preston Sharp, Executive Director of the American Correctional Association, said:

> The most common method of dealing with revenues from prison industries is the "revolving fund" approach in use in most state systems. In revolving fund systems, profits are used for industries-related or prison welfare-related purposes; *e.g.*, inmate wages, salaries for civilian supervisors, capital expenditures for industrial facilities, maintenance and other operating costs of the industry, inmate recreation funds, and in some cases, gratuitous payments for non-working prisoners. Neither Mississippi nor Alabama uses this approach. Alabama's program is even more unfortunate than Mississippi's in that the labor of inmates must raise a certain portion of the correctional program's budget or the system will face a like cut in appropriations; remaining profits over the required share revert to the state's general fund.

Telephone interview with E. Preston Sharp, February 7, 1974.

[73] 349 F. Supp. 881 (N.D. Miss. 1972).

tiffs. The first class consisted of all inmates confined at Parchman who claimed deprivations of the constitutional and statutory rights previously recited. The second class consisted of Parchman's black inmates whose grievances included racial discrimination and segregation as well as the deprivations claimed by the first class.

On August 20, 1971, the United States sought leave to intervene in this suit pursuant to section 2000h-2 of Title 42 of the United States Code.[74] Its motion was granted by the court on August 23, 1971, making *Gates* the first prison reform suit in which the federal government had intervened.

Thereafter all parties conducted extensive pretrial discovery proceedings, and the court calendared a full 3-week evidentiary hearing on all merits of the case to commence on May 15, 1972.

Defendants' motion for a continuance of the trial date filed April 12, 1972, was denied by court following a hearing; yet the scheduled trial never took place. On May 11, 1972, just 4 days before the trial date, counsel for all parties agreed to waive presentation of evidence in open court and to submit the case on the record as made. The record included, among other things: the pleadings, stipulations, depositions, interrogatories and answers, offers of proof, factual summaries, proposed trial plans, evidentiary synopses, photographs, exhibits, reports, and other documentary evidence assembled by the parties. All of these items were admitted into evidence, defendants stipulating that they would not contest the facts set forth therein.[75]

At the hearing of May 11, 1972, the defendants did more, however, than merely stipulate as to facts. Mississippi's Governor forthrightly conceded the constitutional violations in the operation of Parchman alleged in the plaintiffs' complaint. "We are, in effect, Your Honor, admitting that the constitutional provisions have been violated."[76]

On September 12, 1972, the court issued its Findings of Fact and Conclusions of Law,[77] but reserved entry of its judgment and requested

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[74]*Id.* at 885.

[75]*Id.* at 886.

[76]Gates v. Collier, No. GC 71-6-K, Transcript of Hearing, May 11, 1972, at 45. It is noteworthy that the defendant-prison administration and State of Mississippi never placed in issue a single fact introduced into the record by private plaintiffs or the United States nor did the defendants dispute a finding of fact made by the court. The Governor himself, seeking to limit the record, asked the court:

> Isn't there enough of the incriminating facts in these depositions and interrogatories to give the Court adequate grounds to find a conclusion of fact that the first amendment and all the other constitutional provisions have been violated . . . ?

*Id.* at 43.

[77]Gates v. Collier, 349 F. Supp. 881, 885-93 (N.D. Miss. 1972).

counsel for all parties and interested state and federal officials to appear at a conference on October 16, 1972.

During this 2-day conference, the court heard the views of all interested parties including penitentiary officials, penitentiary board members, members of the legislature and various state agencies, Law Enforcement Assistance Administration representatives, and the expert witnesses for the United States, Mr. James V. Bennett, former Director of the Federal Bureau of Prisons, and Dr. Robert Brutshe, Chief Medical Officer of the Federal Bureau of Prisons.

A number of technical experts made specific suggestions for improvement of certain phases of Parchman's operations. Counsel then submitted their recommendations as to the proper scope and content of the court's judgment. The judgment was entered on October 20, 1972.

### *B. An Analysis of the Decision—Findings of Fact*

At the outset it must be recognized that Mississippi's penal failures are not unique to this state. Degrading prison conditions have evoked plans for penal reform from various segments of our society[78] and are a great factor in the cause of recent prison disorders.[79] In addition there has been an increasing public awareness that most inmates eventually return to society adversely affected by their prison experiences.[80]

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[78]In a memorandum dated November 13, 1969, requiring Attorney General Mitchell to prepare a plan for the modernization of the federal prison system and to expand federal assistance to state and local correctional officials, President Nixon began by stating: "The American system for correcting and rehabilitating criminals presents a convincing case of failure." 5 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1596 (Nov. 17, 1969). Chief Justice Burger has actively supported penal reform in recent years. *See, e.g.*, Burger, *No Man Is an Island*, 56 A.B.A.J. 325 (1970). Ramsey Clark, former United States Attorney General, has described modern American prisons as "factories of crime" and has strongly advocated sweeping reform. R. CLARK, CRIME IN AMERICA 192-218 (1970).

[79]*See, e.g., Why Prisoners Riot*, 35 FED. PROBATION March 1971, at 9. As an example of the causal relationship between deficient prison facilities and prison rioting, between Oct. 1 and Oct. 6, 1970, rioting occurred at five jails in New York City. The list of prisoner complaints included bad food, brutality, vermin in the cells, and a prison population which was 183 percent over designed capacity. N.Y. Times, Oct. 4, 1970, at 77, col. 5. Among the original demands of rioting inmates at Attica State Correctional Facility in New York were meaningful rehabilitation programs, better food, competent medical care, and more recreation with less cell time. *Id.* Sept. 10, 1971, at 1, col. 3.

[80]The lasting effects of incarceration cannot be underestimated. Although deterrence of future criminal behavior is one goal of the penal system, present methods of institutionalization have failed. "The most important crime statistic is . . . that 80 percent of all felonies are committed by repeaters. That is, four-fifths of our major crimes are committed by people who are already known to the criminal justice system." R. CLARK, *supra* note 78, at 195-96 (1970). While estimates of recidivism vary depending upon the source, it has been suggested that as many as two out of three released inmates will be reconvicted. Note, *Turn 'em Loose: Toward a Flexible Corrections System*, 42 S. CAL. L. REV. 683-84

The State of Mississippi, the Governor, the Legislature, and prison administrators cannot escape responsibility for inhumane conditions at Parchman. Lest the erroneous impression be conveyed by the State of Mississippi and those responsible that matters at Parchman never really were all that bad and that now, thanks to defendants' good faith efforts, conditions at Parchman are beyond reproach, some dispassionate synopsis of the findings of fact from *Gates* must be set forth.

The district court found the following facts:[81]

1. The policy and practice at Parchman has been and is to maintain a system of prison facilities segregated by race through which black inmates are subjected to disparate and unequal treatment. Blacks are housed in more crowded quarters than whites and are denied the same vocational training opportunites. Blacks have been punished and disciplined more severely than whites for similar infractions of penitentiary rules.

2. The housing units at Parchman are unfit for human habitation. Facilities for the disposal of human waste at all camps are shockingly inadequate and present an immediate health hazard. Contamination of the prison water supply caused by inadequate sewerage has led to the spread of infectious diseases.

3. Many of the gross housing deficiencies at Parchman are of long standing and result from public and official apathy toward the fundamental needs of the inmates.

4. The medical staff and available facilities at Parchman fail to provide adequate medical care for the inmate population. As a result many inmates have not received prompt or efficient medical examination, treatment, or medication. Inmates are often discouraged from seeking needed medical attention by punishing those who on examination appear to be healthy.

5. Except for those confined in the Maximum Security Unit, all inmates are housed in open barracks known as "cages" and are thus at the mercy of each other. The risk of personal injury created by cage confinement is increased by (a) defendants' failure to classify inmates according to the severity of their offenses, (b) the prison's reliance on inmates rather than trained civilian guards as custodial personnel, and (c) the failure of prison authorities to confiscate the weapons many inmates are known to possess. Also, "[t]he evidence is replete with instances of inhumanities, illegal conduct and other indignitives vis-

(1969). *See also* D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 19-20 (1964); Goldman and Holt, *How Justice Works: The People vs. Donald Payne*, NEWSWEEK, March 8, 1971, at 20; Metzner & Weil, *Predicting Recidivism: Base-Rates for Massachusetts Correctional Institution Concord*, 54 J. CRIM. L.C. & P.S. 307-16 (1963).

[81]Gates v. Collier, 349 F. Supp. 881, 887-92 (N.D. Miss. 1972).

ited by inmates who exercise authority over their fellow prisoners."

6. Armed inmate trusties, selected without objective criteria or uniform standards and insufficiently trained to cope with their duties, perform the primary guard function at Parchman. Besides abusing their authority and engaging in loan-sharking, extortion and other illegal conduct, the trusties at Parchman have shot, maimed or otherwise physically maltreated scores of inmates subject to their control.

7. Inmates at Parchman relegated to the punishment side of the Maximum Security Unit have often been placed in the "dark hole" without clothes, hygiene materials, or adequate food for periods of 48 to 72 hours. During such confinement the cell is not cleaned nor is the inmate permitted to bathe.

8. Among the forms of physical brutality inflicted on inmates by prison authorities are: beating; the forced administration of milk of magnesia; stripping inmates of their clothes and turning fans on them while naked and wet; depriving inmates of mattresses, hygiene materials and food; handcuffing inmates to fences and cell bars for protracted periods; shooting at inmates to compel them to maintain assumed positions; and subjecting them to the cattle prod.

9. Inmates subject to disciplinary action for alleged violations of prison rules are (a) not informed either orally or in writing of the charges against them prior to interviews before the "trial council," (b) denied the opportunity to present witnesses in their own behalf or to cross-examine adverse witnesses, (c) charged on the basis of reports prepared by prison personnel without first hand knowledge of the facts involved, and (d) denied the assistance of a representative or the availability of a transcript. Punishments imposed have not been uniform and in some instances have been meted out for conduct which is not a violation of prison rules.

10. Censorship of prisoners' mail is commonplace; some camp sergeants (often illiterate) delegate their censorship duties to their wives.

### *C. An Analysis of the Decision—The Judgment*

In an analysis of the *Gates* judgment, it is helpful to divide the opinion into the four major constitutional claims currently employed to attack prison conditions and practices. The following outline will serve as a structure for a discussion of the *Gates* judgment:

1. Eighth Amendment—Cruel and Unusual Punishment
   a. Corporal Punishment
   b. Disciplinary Confinement
   c. Deprivation of Basic Human Needs
      (1) Medical Care
      (2) Physical Facilities

d. Protection of Inmates
   (1) Classification and Assignment
   (2) Elimination of Custodial Trusties
   (3) Protection from Assault
2. Fourteenth Amendment—Due Process: Inmate Discipline
3. Fourteenth Amendment—Equal Protection: Racial Segregation and Discrimination
4. First Amendment—Censorship of Mail

### 1. Eighth Amendment[82]—Cruel and Unusual Punishment

While the eighth amendment's proscription against cruel and unusual punishment appears tailor-made for the protection of prisoners' rights, it is only within the last decade that courts have begun interpreting the amendment in a manner requiring a reevaluation of the present concepts of penal conditions and practices.[83]

The force of the amendment, however, is not limited to the prohibition of only those atrocities that would have turned the stomachs of the framers of the Constitution in the 18th century.[84] This conclusion is compelled by both authority and reason. "[I]t is a constitution we are expounding,"[85] and the Constitution "states or ought to state not rules for the passing hour, but principles for an expanding future."[86] Such a

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[82]U.S. CONST. amend. VIII, which reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

The cruel and unusual punishment clause of the eighth amendment is made applicable to the states through the due process clause of the fourteenth. Robinson v. California, 370 U.S. 660 (1962), so holds, and there can be little doubt that this Bill of Rights guarantee, whose "basic concept . . . is nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion of Chief Justice Warren), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to the Magna Carta (*See* Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 CALIF. L. REV. 839, 845-46 (1969)) through the Bill of Rights of 1689 (1 Wm. & Mary, sess. 2, ch. 2, preamble, clause 10), amply establishes that it is a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " Palko v. Connecticut, 302 U.S. 319, 325 (1937), *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[83]*See* Note, *Revival of the Eighth Amendment: Development of the Cruel-Punishment Doctrine by the Supreme Court*, 16 STAN. L. REV. 996 (1964).

[84]Certainly the eighth amendment does bar those atrocities, but they mark only the minimum content of its prohibition. This is what was meant in Wilkerson v. Utah, 99 U.S. 130, 136 (1879), by the observation that although the exact extent of the cruel and unusual punishment clause is difficult to define, "it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden." *Wilkerson* does not suggest, as the *Weems v. United States* dissent seems to imply, that torture is the outer limit of the amendment. Weems v. United States, 217 U.S. 349, 400-01 (1910) (White, J. dissenting).

[85]McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[86]B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 83 (1921). *See also* Robinson v.

conception of evolving standards is firmly entrenched in constitutional jurisprudence and in the eighth amendment in particular.

The constitutional test applied to the cruel and unusual punishment clause of the eighth amendment has been expressed in at least three different ways by courts assessing the validity of a particular type of penal or institutional custom and practice. Under one view, the practice is constitutional unless it is of such a character as to shock the general conscience of a civilized society or is intolerable to fundamental fairness.[87] The second test or analysis would find violative of the eighth amendment any punishment greatly disproportionate to the offense.[88] The third view holds unconstitutional even a practice applied in a pursuit of legitimate penal aim if it extends beyond what is necessary to achieve that goal.[89] Today these three tests offer a general guideline for the judiciary in determining the constitutionality of prison conditions and practices.[90]

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California, 370 U.S. 660, 666 (1962) (referring to "the light of contemporary human knowledge"); Jackson v. Bishop, 404 F.2d 571, 578-80 (8th Cir. 1968); Goss v. Bomar, 337 F.2d 341, 342-43 (6th Cir. 1964) (dictum). In Trop v. Dulles, 356 U.S. 86, 101 (1968), the Court stated that the scope of the cruel and unusual punishment clause "is not static," and that the "amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (plurality opinion of Chief Justice Warren). As early as 1910 the Court held that the clause is "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910).

[87]In Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, No. C-173-217, at 100 (Mich. Cir. Ct. 1971), the court concluded:

> Confinement as barbarous as this must threaten the health of the prisoner. Confinement as debased and degrading as this must, inevitably, erode the spirit and undermine the sanity of even the strongest man. Confinement under such conditions shocks the conscience. Its dehumanizing aspects are an affront to civilized notions of rudimentary human decency. We cannot believe that such confinement is a permissible exercise of governmental authority over a citizen of a civilized society in the year 1971.

*Id.* at 100-01.

[88]Robinson v. California, 370 U.S. 660, 676 (1961); Weems v. United States, 217 U.S. 349, 366 (1910); O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (dissenting opinion); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962). The amendment's language itself is based upon the concept of proportionality, forbidding *excessive* bail or fines.

In Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970), *modified sub. nom.* Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), *cert. denied sub. nom.* Sostre v. Oswald, 404 U.S. 1049, *cert. denied*, 405 U.S. 978 (1972), the district court found that, based on the eighth amendment, the imposition of punitive segregation on the plaintiff for an indefinite period was disproportionate to any infraction of prison rules committed.

[89]Rudolph v. Alabama, 375 U.S. 889, 890-91 (1963) (Goldberg, J., dissenting from denial of cert.); Anderson v. Nosser, 438 F. 2d 183, 191, 193 (5th Cir. 1971); Dearman v. Woodson, 429 F.2d 1288, 1290 (10th Cir. 1970); *cf.* Hancock v. Avery, 301 F. Supp. 786, 791 (M.D. Tenn. 1969).

[90]*See, e.g.*, Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970); Dearman v. Woodson,

*Gates* is a classic example of the ever-evolving interpretation of the eighth amendment with expansion of its application in some areas and a reluctance to expand in others.

In an attempt to analyze eighth amendment treatment in the *Gates* decision, attention is focused first on the most primitive of disciplinary forms, that of the actual infliction of physical force on a prisoner.

### a. Corporal Punishment

As depicted in *Gates*, the systematic use of physical violence against the prisoners at Parchman has been an officially condoned, common practice limited only by the imagination of those in power.[91] Stating that "[C]orporal punishment, especially *when of such severity as to offend contemporary concepts of decency and human dignity*, is violative of the Eighth Amendment,"[92] the court enjoined all those punishments which it deemed to fall under this standard.[93]

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429 F.2d 1288 (10th Cir. 1970); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971); Hamilton v. Schiro, 338 F. Supp. 1016 (E.D. La. 1970); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 204 (8th Cir. 1971) (Holt II); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969) (Holt I); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969), *aff'd*, 435 F.2d 1255 (3d Cir. 1971); Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966). *See also* Woolsey v. Beto, 450 F.2d 321 (5th Cir. 1971); Cunningham v. Wingo, 443 F.2d 195 (6th Cir. 1971); Dryer v. Jalet, 349 F. Supp. 452 (S.D. Tex. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Schmitt v. Crist, 333 F. Supp. 820 (E.D. Wis. 1971); Lollis v. New York State Dept. of Social Services, 322 F. Supp. 473 (S.D.N.Y. 1970); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970), *aff'd.*, 439 F.2d 146 (5th Cir. 1971); Jackson v. Hendrick, 40 U.S.L.W. 2710 (Phil. C.P., Pa. 1972); Pingley v. Coiner, 186 S.E.2d 220 (W. Va. 1972).

[91]349 F. Supp. at 890. Plaintiff's uncontested Proposed Findings of Fact, in the record in *Gates* which formed part of the basis for the Court's findings, outlined specific names of prison officials who had perpetuated physical punishment upon prisoners:

(a) Shootings by civilians and trusties upon prisoners:

44 documented incidents causing wounds or death. Estimates that 100 inmates were so wounded. At least 11 incidents resulted in death to the victim.

Gates v. Collier, No. GC 71-6-K (June 1972), Proposed Findings of Fact, at 45-52, paras. 25-56.

(b) Prisoners beaten or otherwise physically mistreated by, at the direction of or with the acquiescence of civilian officials:

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|---|---|
| Sgt. Bagwell: | 3 inmates |
| Sgt. Moody: | 12 inmates |
| Sgt. Burchfield: | 7 inmates |
| Sgt. Vanlandingham: | 8 inmates |
| Sgt. Childs: | 8 inmates |

Gates v. Collier, No. GC 71-6-K (June 1972), Proposed Findings of Fact, at 140-45.

[92]Gates v. Collier, 349 F. Supp. 881, 895 (N.D. Miss. 1972) (emphasis added).

[93]*Id.* at 900. For a list of the enjoined practices, see note 81 and accompanying text *supra* (Findings of Fact number 8).

The inherent weakness of such an order is readily apparent when considered against the background of Parchman administrators' history of summary and unconstitutional punishment of prisoners. In effect, the court's ruling prohibits only those punishments specifically enumerated, permitting all others that do not "offend present day concepts of decency." This ruling only begs the initial constitutional question of what is cruel and unusual punishment and ultimately permits the determination to be made by the prison authorities themselves. While the ruling may be successful in eliminating the enumerated abuses, one can reasonably expect new varieties of punishment to replace the old, thus circumventing the purpose of the decision.

Plaintiffs sought an injunction against the use of the whip or lash as a form of corporal punishment under any circumstances. Although the court intimated that such corporal punishment as a disciplinary measure was unconstitutional,[94] it refused to issue the injunction on the basis that such an order would require a three-judge court.[95]

The barbaric Mississippi statute which permits the use of the whip or lash offends present day concepts of human dignity. Although the court found that the lash had not been used at Parchman since 1965,[96] it failed to recognize that the threat of the use of the whip or lash is a common tactic presently employed by the prison administration at Parchman.

It is submitted that a three-judge court is not required for the purposes of invalidating the statute. The rule established in *Bailey v. Patterson*[97] and its progeny obviates the requirement of a three-judge court where the statute involved is obviously unconstitutional,[98] and the

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[94]349 F. Supp. at 895. The court cited MISS. CODE ANN. § 7968 (1942) [MISS. CODE ANN. § 47-5-15 (1972)] which provides for up to seven "licks and lashes" upon approval by the superintendent.

[95]A three-judge district court must be convened pursuant to Title 28 of the United States Code, section 2281, whenever an injunction is sought against enforcement of a state statute.

The general logic behind section 2281 is to prevent a single federal judge from frustrating a state's legislative policy. *See generally* Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972); Allen v. State Bd. of Elections, 393 U.S. 554 (1969); *Ex parte* Young, 209 U.S. 123 (1908); Raymond v. Chicago Union Traction Co., 207 U.S. 20 (1907); Phillips v. United States, 312 U.S. 246 (1941); Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (en banc); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

[96]Gates v. Collier, 349 F. Supp. 881, 895 (N.D. Miss. 1972).

[97]369 U.S. 31 (1962).

[98]*See, e.g.*, Goosby v. Osser, 409 U.S. 512, 518 (1973); *Ex parte* Poresky, 290 U.S. 30 (1933); Levering & Garrigues Co. v. Morrin, 289 U.S. 103 (1933); Hannis Distilling Co. v. Mayor and City Council, 216 U.S. 285 (1910); Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (en banc); Kirkland v. Wallace, 403 F.2d 413 (1968); Utica Mut. Ins. Co. v. Vincent, 375 F.2d 129, 131 n.1 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967).

district court's broad conclusion that all corporal punishment is unconstitutional which "offend[s] contemporary concepts of decency and human dignity"[99] would appear to make any claim that the "whipping statute" is not unconstitutional a frivolous gesture; thus obviating the need for a three-judge court. A detailed analysis in support of this assertion is found in *Jackson v. Bishop*.[100] As set forth in *Jackson*, the federal prison system and 48 states had entirely outlawed the practice of corporal punishment in the form of whipping or lashing. Indeed, a review of the various model correctional standards reveals without exception an express condemnation of any form of physical punishment as a disciplinary measure.[101] Since in the *Jackson* case this form of corporal punishment was ruled unconstitutional in Arkansas,[102] Mississippi is the sole remaining supporter of the whip and lash as a disciplinary tool.

The district court's refusal to render the "whipping statute" unconstitutional is a glaring symbolic and substantive weakness in the *Gates* decision.

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[99]Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972).

[100]404 F.2d 571 (8th Cir. 1968). Justice Blackmun, then sitting on the Eighth Circuit Court of Appeals, set forth the following reasons for the unconstitutionality of corporal punishment in the form of whipping or lashing:

> Our reasons for this conclusion include the following: (1) We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse . . . . (6) There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court ascertain the point which would distinguish the permissible from that which is cruel and unusual? (7) Corporal punishment generates hate toward the keepers who punish and toward the system which permits it. It is degrading to the punisher and to the punished alike. It frustrates correctional and rehabilitative goals. This record cries out with testimony to this effect from the expert penologists, from the inmates and from their keepers. (8) Whipping creates other penological problems and makes adjustment to society more difficult. (9) Public opinion is obviously adverse.

*Id.* at 579-80.

[101]STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, FOURTH UNITED NATIONS CONGRESS ON PREVENTION OF CRIME AND TREATMENT OF OFFENDERS Rule 31 (1955, reaffirmed 1970): "Corporal punishment . . . shall be completely prohibited as punishments for disciplinary offences." MODEL PENAL CODE (1962) § 304.7(4): "No . . . corporal punishment shall be used on any prisoner . . . ." NATIONAL COUNCIL ON CRIME AND DELINQUENCY, MODEL ACT FOR THE PROTECTION OF RIGHTS OF PRISONERS § 2(a) (1972): "Striking, whipping, or otherwise imposing physical pain upon a prisoner as a measure of punishment" is prohibited. AMERICAN CORRECTIONAL ASSOCIATION, MANUAL OF CORRECTIONAL STANDARDS ch. 15, Rule 4 (1966) [hereinafter cited as MANUAL OF CORRECTIONAL STANDARDS]: "[N]o corporal punishments shall be employed as correctional measures."

[102]Jackson v. Bishop, 404 F.2d 571, 575 (8th Cir. 1968).

### b. Disciplinary Confinement

Perhaps an even more drastic penalty than whipping or other physical punishment inflicted upon an inmate is segregated confinement. Confinement to solitary, isolation, the "hole", maximum security, or whatever term that may be used connotes a practice that is both unquestionably dangerous to the prisoner as well as self-defeating in terms of improving discipline.[103] Unfortunately, courts have not recognized that solitary confinement violates constitutional standards per se,[104] nor did the court in *Gates* make such a finding.

The courts since 1966 have, however, utilized the eighth amendment as a constitutional basis for challenging disciplinary confinement.[105] Outrageous conditions of prison disciplinary cells styled after

[103]It has long been recognized that solitary confinement cannot be considered a mere custodial matter. It can cause mental illness, mental deterioration, induce suicidal tendencies, and interfere with the possibilities of rehabilitation. *Ex Parte* Medley, 134 U.S. 160, 167-68 (1890); New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752, 764-65 (E.D.N.Y. 1973). In La Reau v. MacDougall, 354 F. Supp. 1133 (D. Conn. 1971), *aff'd*, 473 F.2d 974 (2d Cir. 1972), the Second Circuit ruled that solitary confinement of a prisoner for 5 days was cruel and unusual punishment because it threatened his sanity. In Inmates of Boys Training School v. Affleck, 346 F. Supp. 1354, 1365 (D.R.I. 1972), the court enjoined the use of cells closely resembling solitary cells *even though* defendants had voluntarily closed those cells. *See also* Nelson v. Heyne, Civ. No. 72598 (S.D. Ind., June 15, 1972) (finding solitary confinement practices to be cruel and unusual punishment).

In Wyatt v. Stickney, 344 F. Supp. 387, 400 (M.D. Ala. 1972), the court enjoined defendants from placing mentally retarded persons in seclusion for even 1 minute.

For discussion of the harmful effects of isolation see, R. Barton, Institutional Neurosis (2d ed. 1966); I. Belknap, Human Problems of State Mental Hospitals (1956); E. Goffman, Asylums, (1961); Gralnick & Duncan, *Mental Patients in Transition*, in Mental Patients in Transition (M. Greenblatt ed. 1961); D. Vaid, Dehumanization and the Institutional Career (1966); J. Wing & S. Brown, Institutionalization and Schizophrenia (1970); Comment, *Solitary Confinement—Punishment within the Letter of the Law, or Psychological Torture?*, 1972 Wisc. L. Rev. 223.

The American Correctional Association has formally recognized: "Perhaps we have been too dependent on isolation or solitary confinement as the principal method of handling the violators of institutional rules. Isolation may bring short-term conformity for some, but brings increased disturbances and deeper-grained hostility to more." Manual of Correctional Standards, *supra* note 101, at 413.

[104]Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972); Novak v. Beto, 453 F.2d 661, *reh. denied*, 456 F.2d 1303 (5th Cir.), *cert. denied*, 409 U.S. 968 (1972); Adams v. Pate, 445 F.2d 105 (7th Cir. 1971); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970), *cert. denied*, 404 U.S. 1062 (1972); Courtney v. Bishop, 409 F.2d 1185 (8th Cir. 1969), *cert. denied*, 396 U.S. 915 (1969); Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969); Kostal v. Tinsley, 337 F.2d 845 (10th Cir. 1964), *cert. denied*, 380 U.S. 985 (1965); Graham v. Willingham, 384 F.2d 367 (10th Cir. 1967); Krist v. Smith, 309 F. Supp. 497 (S.D. Ga. 1970); Roberts v. Barbosa, 227 F. Supp. 20 (S.D. Cal. 1964).

[105]Jordan v. Fitzharris, 257 F. Supp. 674 (N.D. Cal. 1966).

medieval dungeons have been declared unconstitutional,[106] and the eighth amendment has been broadened to prohibit not only a specific disciplinary measure itself but also the totality of the prevailing circumstances of the confinement.[107]

The *Gates* court adopted this expanded approach and found there to be cruel and unusual punishment when "inmates have been deprived of the basic elements of hygiene, or have been placed on a starvation diet for indeterminate periods of time, or have been subjected to brutal or dehumanizing practices in the course of their solitary confinement."[108] Establishing minimum standards for solitary confinement, the court enjoined all disciplinary segregation or isolation including the "dark hole" except under specified conditions providing for: (a) a minimum diet of 2,000 calories per day; (b) proper clothing; (c) hygenic supplies; (d) bedding equipment; and (e) proper sanitary conditions.[109]

A traditional method at Parchman for disciplinary confinement has been the utilization of the "dark hole." The findings in *Gates* point out that the "punishment side" of the Maximum Security Unit (MSU),[110] contains both the standard solitary cells and several smaller cells known as dark holes. These dark holes measure 6 feet by 6 feet "with no lights, commode, sink or other furnishings. A hole in the concrete floor is located in the middle of the cell and is approximately six inches in diame-

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[106]Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969); Holt v. Sarver, 300 F. Supp. 825 (E.D. Ark. 1969).

[107]*E.g.*, Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970); Courtney v. Bishop, 409 F.2d 1185 (8th Cir.), *cert. denied*, 396 U.S. 915 (1969); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967); Hancock v. Avery, 301 F. Supp. 786 (M.D. Tenn. 1969).

[108]Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972).

[109]*Id.* at 900.

[110]Within the Maximum Security Unit an inordinate amount of brutality was inflicted by trusties and free-world officials on prisoners. This brutality can only be characterized as retributive since prisoners are "locked down" and security is strict. Incidents included:

(1) Handcuffing of inmate Mathew Winters to the MSU bars, stripping him naked, hosing him down with water and leaving him in his cell with no heat, with windows open and a fan blowing on him.

Gates v. Collier, No. GC 71-6-K, United States Government Exhibit 690-16; Joint Trial Plan, Item 116.

(2) Inmates were often kept in cells without mattresses, commodes or sinks.

*Id.* Transcript of Temporary Restraining Order Hearings, Oxford, March 10, 1971, at 5-8.

(3) Notorious "punishment side" cellblock where inmates had no mattresses or personal possessions (writing paper, personal hygiene materials, etc.) and received starvation diets of 500-700 calories per day for up to thirty days.

*Id.* United States Government Exhibit entitled "Disciplinary Reports" entered into the record on May 11, 1972.

(4) Laxatives given routinely to inmates at MSU.

*Id.* Transcript of Temporary Restraining Order Hearings, Oxford, March 10, 1971, at 151-52; Anderson v. Nosser, *supra*, note 52.

ter that will flush to dispose of body wastes. A heavy metal door with no windows closes the cell."[111] Aside from the physical description of the hole itself, *Gates* recognized the common practice of confinement to include "plac[ing] inmates in the dark hole naked, without any hygienic materials, and often without adequate food."[112] The court further recognized that while state statute restricts confinement in the dark hole to 24 hours, inmates have often been confined up to 72 hours.[113] During this time, "the cell is not cleaned, nor is the inmate permitted to wash himself."[114]

The three-judge court problem was raised again with respect to the statute providing for a maximum of 24 hours of dark hole confinement.[115] As with the issue of corporal punishment, the court ruled that an injunction of the statute required the special court. The court concluded, however, that many of the practices attending the use of the dark hole were unconstitutional and ruled that the same minimum standards established for solitary confinement also be applied to the dark hole with the added provision that no inmate be confined in the dark hole for over 24 hours.[116]

While several cases have found a particular length of punitive confinement disproportionate to the offense committed,[117] not since *Sostre*

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[111]Gates v. Collier, 349 F. Supp. 881, 890 (N.D. Miss. 1972).

[112]*Id.*

[113]*Id.* Indeed, the United States, plaintiff-intervenors in *Gates*, submitted testimony that prisoners were confined up to 30 days in the dark hole. Gates v. Collier, No. GC 71-6-K, United States Government Exhibit No. 31, Deposition of Sgt. E.R. Moody, at 388.

[114]349 F. Supp. at 890. Other shocking practices of the prison administration with respect to the dark hole included:

(1) Prior to confinement, inmates' heads were shaved with sheep shears.
Gates v. Collier, No. GC 71-6-K, Testimony of former Superintendent Thomas D. Cook at hearings held in Oxford, Mississippi, March 10-11, 1971, at R.333-34.

(2) Inmates were not fed while in the dark hole.
*Id.* Transcript of Temporary Restraining Order hearings, Oxford, March 10, 1971 at 86, 94.

(3) More than one inmate was confined in the dark hole at the same time.
*Id.* Transcript of T.R.O. hearings, Oxford, March 10-11, 1971, testimony of W. Holmes at 148-49; Deposition of E.R. Moody at 377.

[115]349 F. Supp. at 895. Court cited MISS. CODE ANN. § 7968 (Supp. 1971) [MISS. CODE ANN. § 47-5-145 (1972)] which provides for up to 24 hours of confinement in the dark hole.

[116]349 F. Supp. at 900.

[117]*E.g.*, Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (where the court held that indefinite solitary confinement for the failure to sign a "safety sheet" before beginning work in a prison shop was grossly disproportionate to the offense committed); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970) (stating that 4½ months of solitary confinement for writing a letter to a judge criticizing prison personnel was unreasonable and disproportionate). *See also* Robinson v. California, 370 U.S. 660, 676 (1961) (concurring opinion); Fulwood v. Clemmer, 206 F. Supp. 370, 379 (D.D.C. 1962).

*v. Rockefeller*[118] has a court attempted to place a specific period of time on the permissible length of punitive segregation. In *Sostre* the district court ruled that any confinement in punitive isolation exceeding 15 days was cruel and unusual regardless of the offense committed.[119] On appeal, however, the Second Circuit rejected this holding, and no court since *Sostre v. Rockefeller* has upheld a similar limitation in the penal context.[120]

While it could be contended that the 24-hour limitation is merely a restatement of state law, the court's legal analysis leaves no doubt that this limitation is based upon constitutional considerations.[121] As such, *Gates'* limitation confinement in the dark hole to 24 hours is an unprecedented step in the area of judicial restriction of punitive segregation.[122]

The court prohibited confinement unless the cells are "adequately heated, ventilated and maintained in a sanitary condition . . . ."[123] As the dark holes exist today, absent a commode and sink, they do not meet these minimum sanitary conditions, and although their use has not been enjoined, they can not be employed in a manner conforming with the *Gates* standards. Therefore, their use has been tacitly prohibited.[124] The dark holes, however, are still used despite *Gates*, and thus an even greater urgency exists for having the statutory authority for the dark holes reviewed by a proper three-judge court.

Unmistakeably the dark holes at Parchman fall far short of minimal constitutional requirements. The total absence of sanitation facilities such as toilets and sinks, the total absence of light, the cramped size of the cells, and the general unsanitary conditions combine to create an environment entirely incapable of satisfying the dictates of the eighth amendment. The prison administration at Parchman should have been forever enjoined from utilizing the dark holes in *Gates*.

### c. Deprivation of Basic Human Needs

#### (1) Medical Care

The difficulty courts have incurred in formulating tests to measure eighth amendment violations is especially apparent in the area of medi-

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[118]312 F. Supp. 863 (S.D.N.Y. 1970).

[119]*Id.* at 868.

[120]Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971).

[121]Gates v. Collier, 349 F. Supp. 881, 894 (N.D. Miss. 1972). The court held "that Parchman inmates have been subjected to *constitutionally forbidden cruel and unusual punishment* when they have been confined in MSU's dark hole cells . . . for longer than 24 hours continuously." *Id.*

[122]*See generally* Comment, *Punitive Segregation in State Prisons—The Need for Definite Time Limitations*, 76 DICKINSON L. REV. 125 (1970).

[123]Gates v. Collier, 349 F. Supp. 881, 900 (N.D. Miss. 1972).

[124]*Id.*

cal treatment.[125] In attempting to resolve the question of what is cruel and unusual in the area of medical treatment some courts have distinguished between a total denial of medical treatment and mere improper or inadequate medical treatment.[126] Recently courts have articulated the constitutional standards for medical treatment in terms of a prisoner's right to reasonable and adequate care.[127]

Medical care within a penal institution is expensive. Because of this expense plus the general indifference to human life at Parchman, Mississippi historically failed to offer inmates even the rudiments of minimum medical attention until the order in *Gates*.[128] The district court

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[125]Comment, *Constitutional Limitations of Prisoners' Rights to Medical Treatment*, 44 Miss. L.J. 525, 528 (1973).

[126]Courts have traditionally held that mere improper or inadequate care is not a constitutional deprivation; the action must constitute a total denial of care. *See, e.g.*, Oaks v. Wainwright, 430 F.2d 241 (5th Cir. 1970); Cates v. Ciccone, 422 F.2d 926 (8th Cir. 1970); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968); Thompson v. Blackwell, 374 F.2d 945 (5th Cir. 1967).

[127]*E.g.*, Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) ("deprivation of basic elements of adequate medical treatment" held unconstitutional); Blanks v. Cunningham, 409 F.2d 220, 221 (4th Cir. 1969) (prisoners "entitled to reasonable medical care"); Edwards v. Duncan, 355 F.2d 993 (4th Cir. 1966); Collins v. Schoonfield, 344 F. Supp. 257, 277 (D. Md. 1972) (inmate must be provided "reasonable medical assistance . . . including a reasonable medical examination; access to sick call; treatment for special medical problems; proper dental attention and adequate suicide prevention techniques"); Jones v. Wittenberg, 330 F. Supp. 707, 718 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) ("adequate" medical care ordered); Talley v. Stephens, 247 F. Supp. 683, 687 (E.D. Ark. 1965) (inmates entitled to demand "reasonable medical attention for injuries and disabilities, at all reasonable times, and to . . . attendance at sick calls at reasonable times"). In Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972) the court stated:

> When practices within a prison system result in the *deprivation of basic elements of adequate medical treatment, then such practices violate constitutional guarantees* and federal courts must act to provide relief.

*Id.* at 281 (emphasis added). One court defined the right to "adequate and reasonable" care in this manner:

> If the treatment or lack of treatment of a prisoner is such that it amounts to *indifference or intentional mistreatment*, it violates the prisoner's constitutional guarantees. When a state undertakes to imprison a person, thereby depriving him largely of his ability to seek and find medical treatment, it is incumbent upon the state to furnish at least a *minimal amount* of medical care for whatever conditions plague the prisoner.

Sawyer v. Sigler, 320 F. Supp. 690, 696 (D. Neb. 1970), *aff'd per curiam*, 445 F.2d 818 (8th Cir. 1971) (emphasis added).

[128]The court found that:

> The medical staff and available facilities at Parchman fail to provide adequate medical care for the inmate population, with the result that many inmates have not received prompt or efficient medical examination, treatment or medication.

349 F. Supp. at 888.

found that until the eve of the lawsuit only one physician was responsible for the medical care of 2,400 people;[129] that the prison hospital was inadequately equipped;[130] that inmates with contagious diseases were not isolated;[131] and that the prison administration regularly punished inmates who sought medical assistance but were subsequently found not to be sufficiently ill.[132]

Based upon these findings, the court concluded:

> We hold that confinement of inmates at Parchman in barracks unfit for human habitation and in conditions that threaten their physical health and safety by reason of gross deficiencies in plant and equipment and lack of adequate medical staff and facilities, is impermissible. Not only are the inmates thus deprived of their constitutionally protected right to adequate provision for their physical health and well-being, they are denied proper care, treatment and feeding (MISS. CODE § 7930), wholesome food prepared under sanitary conditions (§ 7942) and efficient hospital and medical services (§ 7959) required by state law. The deprivation of basic human needs for housing, food and medical care is not merely unnecessarily cruel and unusual, but is calculated to retard, if not prevent, the process of a prisoner's rehabilitation.[133]

The court's conclusion that prisoners have a "constitutionally protected right to adequate provision for their physical health and well-being" is apparently the first time any court has judicially articulated such a constitutional standard in a prison context. The emergence of such a right to well-being and physical health leads naturally to an evolving eighth amendment theory of lack of rehabilitation as cruel and unusual punishment.[134]

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The United States Government's expert medical witness, Dr. Robert Brutshe, Chief Medical Officer of the Federal Bureau of Prisons, testified that the hygiene and sanitary conditions at the camps and the hospital are shocking. Gates v. Collier, No. GC 71-6-K, Government's Proposed Trial Plan, Synopsis of Dr. Brutshe's Testimony at 5-8, entered into the record in May, 1972.

[129]*Id. See* Gates v. Collier, No. GC 71-6-K, Deposition of Dr. H. Abril, February 8, 1972, at 15. Compare this with the American Correctional Association standards requiring one doctor per 500 inmates.

[130]Gates v. Collier, 349 F. Supp. 881, 888 (N.D. Miss. 1972).

[131]*Id.*

[132]*Id.*

[133]*Id.* at 894. The *Gates* court could have applied the standards of Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972), and found denial of medical care in itself unconstitutional. Instead, Judge Keady preferred to group medical treatment with other conditions of confinement and view the totality of conditions as violative of the eighth amendment as was done in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[134]A discussion of the constitutional right to rehabilitation or treatment is beyond the scope of this article. *See generally* Dodson v. Cameron, 383 F.2d 519 (D.C. Cir. 1967);

In mandating relief in *Gates,* the court required additional medical personnel including at least three full-time physicians, two full-time dentists, two full-time trained physician's assistants, six full-time nurses certified as R.N. or L.P.N., one medical records librarian, and two medical-clerical personnel.[135] The court further ordered the defendants to take steps necessary to bring the hospital and equipment into compliance with state licensing requirements, and "to comply with general standards of the American Correctional Association relating to medical services for prisoners."[136]

Notwithstanding the rather extensive and comprehensive relief, acute problems in the delivery of medical care are still very much in existence today. The prison hospital, because of its barbarous conditions, remains unaccredited and unlicensed by the State of Mississippi.[137]

The prison administration's failure to bring the hospital into compliance with the licensing requirements of the State Hospital Association and American Correctional Association standards should result in its termination as a medical facility.[138]

### (2) Physical Facilities

> [H]ousing units at Parchman are unfit for human habitation under any modern concept of decency.[139]

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Davey v. Sullivan, 354 F. Supp. 1320 (M.D. Ala. 1973); Inmates of Boys' Training School v. Affleck, 346 F. Supp. 1354 (D.R.I. 1972); Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972); Wyatt v. Stickney, 344 F. Supp. 373 (M.D. Ala. 1972); Taylor v. Sterrett, 344 F. Supp. 411, 420 (N.D. Tex. 1972) ("Rehabilitation must be the overriding goal of our correctional institutions. Unless society subordinates all of the correctional purposes to the goal of rehabilitation, it faces the paradox of promoting the production rather than the reduction of crime."); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); Wilson v. Kelley, 294 F. Supp. 1005, 1012-13 (N.D. Ga.), *aff'd mem.,* 393 U.S. 266 (1968).

The American Correctional Association states that the prison's "basic purpose" is "the rehabilitation of those sent there by society." MANUAL OF CORRECTIONAL STANDARDS OF THE AMERICAN CORRECTIONAL ASSOCIATION 421.

[135]Gates v. Collier, 349 F. Supp. 881, 901 (N.D. Miss. 1972). While similar staffing ratios were ordered in Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972) (attacking mental hospitals in Alabama), *Gates* is the first extension of that type of relief in the penal context. *See also* Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972); Newman v. Alabama, 349 F. Supp. 278 (M.D. Ala. 1972); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972).

[136]Gates v. Collier, 349 F. Supp. 881, 901 (N.D. Miss. 1972).

[137]Gates v. Collier, No. GC 71-6-K, Deposition of Dr. James Warrington, April 25, 1973, at 36-39.

[138]Compare the *requirement* of construction of a new medical facility in Martarella v. Kelley, 359 F. Supp. 478 (S.D.N.Y. 1973); Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972).

[139]349 F. Supp. at 887.

In the past, deplorable physical facilities at a prison—although a cause of dismay to inmates—were seldom deemed a problem of constitutional dimension. Courts retained the premise that a facility may be old, overcrowded, unattractive, and not particularly suited to its purposes of confinement, but that these deprivations were not unconstitutional.

The first successful attack on a prison's physical facilities in its entirety was in *Holt v. Sarver.*[140] With conditions remarkably similar to those that exist at Parchman, *Holt* held the *entire* Arkansas prison system violative of the eighth amendment. The court based its conclusions on the combined effects, among other factors, of barracks sleeping arrangements, overcrowded and unsanitary cells, an unsanitary kitchen, and total lack of sanitation.[141]

Conditions at the Arkansas prison system were not unique. *Holt* was just the beginning of extended litigation that resulted in judicial orders recognizing that improper facilities in correctional institutions do indeed violate constitutional standards and that courts will require drastic alterations in a penal institution's operations and facilities.[142]

The district court in *Gates* recognized the total deplorable state of physical facilities at Parchman.[143] Building facilities,[144] lack of sanita-

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[140]309 F. Supp. 362 (E.D. Ark. 1970).

[141]*Id.* at 376-81.

[142]*See, e.g.*, Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, Civ. No. 173-217 (Mich. Cir. Ct., May, 1971); Sprowal v. Hendrick, 438 Pa. 435, 265 A.2d 348 (1970) (county jail facilities in Philadelphia held cruel and unusual punishment for pretrial detainees).

For other cases in which federal courts have ordered state or county defendants to reduce overcrowding; subdivide large dayroom areas; provide adequate personal hygiene supplies, clothes, and linens; eliminate filth and insects; repair toilets, sinks, plumbing, and broken equipment; provide evacuation plans and night lights and conduct fire drills; serve warm, nourishing meals; eliminate odors and improve ventilation; provide regular outdoor exercise; and, in general, correct the types of substandard living conditions described in this section, *see, e.g.*, Rozecki v. Gaughan, 459 F.2d 6 (1st Cir. 1972); Baker v. Hamilton, 345 F. Supp. 345 (W.D. Ky. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971). *But see* Lake v. Lee, 329 F. Supp. 196 (S.D. Ala. 1971); Pingley v. Coiner, 186 S.E.2d 220 (W. Va. 1972) (conditions similar to those in the cases above were held "unpleasant" but not unconstitutional). *See also* Note, *Pretrial Detainment—The Jailer's Duty to Provide Jail Inmates "Reasonable Protection" and Facilities Conforming to State and Local Housing Codes*, 18 WAYNE ST. L. REV. 1601 (1972); Note, *Cruel and Unusual Punishment—Arkansas State Penitentiary System Violates the Eighth Amendment*, 84 HARV. L. REV. 456 (1970).

[143]349 F. Supp. at 887-88.

[144]*Id.*

> The building facilities at most camps "are in a deplorable state of maintenance and repair," as reported by the Mississippi Joint Legislative Committee January 4, 1971, and results in sub-human conditions. The electric wiring at a majority of the units is frayed, exposed, and generally in a bad state of repair, presenting safety hazards to the inmates. Heating facilities are inadequate to heat the

tion,[145] poor water supply,[146] lack of hygenic facilities,[147] and all other living conditions provided for inmates were found to be "deplorable and subhuman."[148] Once again, this outrageous state of the prison can be traced directly to the state's philosophy to operate the penitentiary on a profit basis. Further, *Gates* carefully noted that public and official apathy regarding the state of incarcerated prisoners was a contributing cause of the deficiencies of the physical facilities at Parchman.[149]

In attempting to lay the groundwork to build a constitutional prison for Mississippi, the court in *Gates* divided its attention between the

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inhabited areas; many broken windows at the camps are stuffed with rags to keep out the cold, wind and rain.

*Id.* at 887.

The facilities for housing, sheltering and caring for inmates at the great majority of the camps are in severe need of maintenance and repair, if not replacement, because the present conditions are hazardous to the health and safety of human beings.

*Id.* at 888.

[145] *Id.* at 887.

Open sewage is a breeding ground for rats and other vermin. As recently reported by the State Board of Health: "A new sewage system is the most pressing environmental need now existing at the Penitentiary." The entire waste disposal system has been condemned by state health and pollution agencies.

[146] *Id.* Poor water supply at Parchman was characterized as:

Water, contaminated as a result of the inadequate sewerage system, has caused the spread of infectious diseases. At most camps the amount of water available for drinking and sanitation is approximately half enough for inmate personnel. As reported by the State Board of Health February 10, 1972: "The water supply facilities at Mississippi State Penitentiary were found to be inadequate and obsolete . . . to protect the health of the inmates and employees at Mississippi State Penitentiary. The need for a new water system is almost as great as the need for a sewer system."

*Id.*

[147] *Id.* at 887-88. The *Gates* description of the lack of hygienic facilities included:

Bathroom facilities for the inmates at the different camps for basic hygiene are, as a rule, inadequate in number and poorly maintained. According to Mr. Cook, the number and quality of operable commodes, showers, soap containers and other hygienic necessities are inadequate at most camps. For example, at Camp B, there are three wash basins for 80 men which consist of oil drums cut in half. Kitchen facilities and food service are below par. By any standard of decency, the physical facilities are woefully inadequate and far below minimal requirements. Indeed, the photographic evidence depicts filthy bathrooms and barracks, dead rats near the barracks, and mattresses, puchased second-hand, which are old, dirty and in bad repair.

*Id.*

[148] *Id.* at 888.

[149] *Id.* The court stated: "Many of these gross deficiencies are of long standing and are the result of public and official apathy and neglect for the fundamental needs of persons incarcerated for crime."

immediate need for interim building of facilities at Parchman and long-range programs to renovate and reconstruct the prison.[150]

Interim or emergency measures to meet the human needs of prisoners were ordered by the court as specified by a consultant committee which had studied Parchman's needs during the period of preparation for trial.[151] These improvements included the installation of improved facilities, renovation of living quarters, employment of additional personnel, and purchasing of various supplies. Costs for the program were budgeted at $1 million, all of which was paid by the Law Enforcement Assistance Administration.[152]

The court additionally ordered the prison administration to prepare and submit not later than December 20, 1972, a comprehensive plan of long-range relief, in order to eliminate:

> all unconstitutional conditions in inmate housing, inadequate inmate housing, inadequate water, sewer and utilities, inadequate firefighting equipment, inadequate hospital and other structures condemned by this court in its Findings of Fact and Conclusions of Law.[153]

At the same time, defendants were instructed to submit detailed progress reports on implementation of provisions for immediate relief.[154] Rather than properly report on definitive actions taken and plans conceived, the state merely sketched the areas mandated for consideration in vague form, noting hopes and requests for funds and improvements in the future.[155]

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[150]*Id.* at 898.

[151]*Id.* at 892, 903.

[152]*Id.* at 892. The irony of the Law Enforcement Assistance Administration (LEAA) contribution of $1 million to assist in building the prison is that LEAA is an arm of the United States Department of Justice. Thus the plaintiff-intervenors in *Gates*, the United States Government, helped to subsidize the defendant prison administration to implement relief which the court ordered.

[153]*Id.* at 903.

[154]*Id.*

[155]See Gates v. Collier, No. GC 71-6-K, Defendants' Submission of Plans, December 20, 1972, Section VIII:

> On classification of inmates: The classification and assignment of inmates *shall be* racially non-discriminatory. . . . In order to implement this system, the Law Enforcement Assistance Administration has made available $40,000.00 in Part E funds which will be matched by approximately $13,300.00 in State funds. The Mississippi State Penitentiary has requested this matching allocation from the Mississippi Capital Improvements Commission.
>
> On medical facilities and services: In regard to upgrading medical facilities in compliance with the Court Order, the Mississippi State Penitentiary has requested of the State Capital Improvements Commission and the Budget Commission budgetary provisions as follows: $150,000.00 for hospital repairs and $40,000.00 for the purpose of hospital equipment and medical supplies.

On February 2, 1973, penitentiary officials submitted the final long-range plans, separating new and renovative construction of physical facilities at Parchman into three phases.[156] The 1973 legislature appropriated $3 million[157] toward "Phase I" of the long-range reconstruction which was matched by a second LEAA grant of $2.77 million. As noted by the appointed federal monitor,[158] in the process of transforming the

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On inmate protection: Also a *request has been made of* the Budget Commission to secure funds for the purchase of materials to subdivide the camps into smaller segments in order to increase inmate protection.

On long-range relief: It is estimated: "that the development of a comprehensive long-range plan for improvements at the Mississippi State Penitentiary, which will conform to the study recommendation of the Court, will require approximately $50,000.00 in professional consultant costs. These funds will be derived from existing and new federal state sources."

*Id.* at 20-28.

[156]Gates v. Collier, No. GC 71-6-K, Defendant's Long-Range Plans submitted Feb. 1, 1973, at 7-9 (emphasis added).

1. "Phase I:" 1973-1974

—Authorize and appropriate funds for construction of new buildings and remodeling of present camp buildings. Estimated 1973 appropriation needed for remodeling in Camps, $1,000,000.

—Authorize and appropriate funds for new water system; cost, $450,000.

—Authorize and appropriate funds for new sewerage system; cost, $400,000.

—Authorize immediate but temporary improvement of present hospital building; probable cost, $150,000.

—Authorize the first steps in upgrading of the farm operations; cost, *$703,000.*

—Upgrade the electrical system; cost, $150,000.

—Install automatic telephone system; cost, $110,000.

—Repair roads; cost, $100,000.

—Acquire sufficient funds for architectural and other planning called for in these recommendations.

—Construct Administrative Security Building.

—Construct new maximum and medium security units; cost, *$1,600,000.*

2. "Phase II:" 1974-1975

—Construct Central Food Service and Cold Storage Plant.

—Remodel Dairy Barn and Pasteurization Plant.

—Centralize radio communications system.

—Install natural gas heating system.

—Install emergency lighting system.

—Continue upgrading of farm operation.

3. "Phase III:" 1975-1976

—Construct new field house.

—Continue upgrading of farm operation.

[157]Miss. Code Ann. § 47-5-5 (Supp. 1973).

[158]As a response to the plaintiffs' and plaintiff-intervenor United States government's submission of evidence in July 1973, of massive beatings of inmates by Parchman civilian guards, Judge William Keady on September 7, 1973, appointed a federal court prison monitor charged with the duty of "[C]hecking all phases of prison administration, management and operation to the extent he may deem necessary to determine sufficiency of

original plans into statutory law, certain priorities were reshuffled by the state with unfortunate consequences.[159] Particularly disturbing was the overall failure by both the prison administration and the legislature to consider rehabilitative rather than custodial needs a priority.[160]

Problems continue with the dilapidated and overcrowded inmate living quarters,[161] inadequate sewage disposal,[162] insufficient provisions

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compliance with the several provisions of this Court's order dated October 20, 1972." Gates v. Collier, No. GC 71-6-K, Amended Order of Sept. 7, 1973, at 2.

The monitor filed four lengthy reports to the court regarding his observations and comments on the defendant prison administration's implementation of the *Gates* order. [References to the Federal Monitor's Reports cited hereinafter as FEDERAL MONITOR REPORT].

The appointment of a monitor to ensure penitentiary compliance with a judicial decree is unusual. The court's authority for such an action is based upon Rule 53 of the Federal Rules of Civil Procedure. Cases where monitors have been appointed to insure compliance in institutional suits include *In re* Patterson, 253 U.S. 300 (1919) (auditor); Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12, 15 (2d Cir. 1971); Jackson v. Hendrick, No. 71-2437 (Philadelphia Ct. C.P., April 21, 1972); Wayne County Jail Inmates v. Wayne County Bd. of Comm'rs, No. C-173-217 (Mich. Cir. Ct. 1971).

[159]For example:

(a) A completely new water system was of emergency priority in the prison administration's long-range plans, Gates v. Collier, No. GC 71-6-K, Defendants' Long-Range Plans submitted Feb. 1, 1973, at 7, but was shifted to Phase II by the legislature. *See* MISS. CODE ANN. § 47-5-5 (Supp. 1973).

> FEDERAL MONITOR REPORT, Sept. 2, 1973, at 12: "Work is also being done on the wells and pumps [as well as on sewerage]. They are hopeful but not sure that pressure will be adequate when the work is complete. Certainly pressure won't be adequate for fire protection."
>
> *Id.* Dec. 15, 1973, at 2: "Central water and sewage systems are lacking. Water pressure varies from location to location and in some areas, is insufficient to meet the needs of the residents." (Basically, this means that the toilets at some camps will not flush.)
>
> *Id.* Oct. 4, 1973, at 16: "Some of the [new] commodes in place cannot be used because of lack of water pressure and some still have not been connected to sewage treatment plants."

(b) The prison administration also emphasized the immediate need for a new sewerage system. Gates v. Collier, No. GC 71-6-K, Defendants' Long-Range Plans submitted Feb. 1, 1973, at 7. This, too, was lowered to second priority.

> FEDERAL MONITOR REPORT, Oct. 4, 1973, at 10: "Raw sewage draining into ditches was observed at two locations."
>
> *Id.* Dec. 15, 1973, at 2: "A number of small sewage treatment plants [also] were installed recently and the adequacy of these plants is questionable."

[160]For example, in the long-range plans there are provisions for both a recreational field house and for a new maximum security unit. The field house, 100 feet by 200 feet, and capable of housing 200 to 300 spectators, has a projected cost of only $125,000 versus a cost of $1 million for the security unit. Gates v. Collier, GC 71-6-K, Defendants' Long-Range Plans submitted Feb. 1, 1973.

[161]FEDERAL MONITOR REPORT, Dec. 15, 1973, at 2:

> Both the housing and other facilities are poorly maintained (there are a few exceptions), many are sub-standard and generally sanitation is well below ac-

for supplying healthy water and water pressure needed to meet the needs of fire prevention,[163] and the dull and distasteful institutional diet[164] which have plagued the prison throughout its existence. In view of statements made by the federal monitor, it is questionable if the defendants' long-range plans will be able to effectively correct any of the problems ingrained in the Parchman system.[165] Several bitterly disappointing flaws in the long-range plans are indicated in the monitor's reports. According to his professional, experienced observations, food service may actually deteriorate rather than improve,[166] and the con-

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ceptable standards. Toilet facilities were inadequate and in deplorable condition.

The inmate quarters are overcrowded. Bedding is in poor condition and often is dirty.

*Id.* at 12:

—Housing is inadequate. It is overcrowded and lacks adequate facilities for rest, recreation, study, and stowage.

—In general, sanitation is poor in quarters, food services and other areas.

[162]See notes 145 & 159 *supra*.

[163]See notes 146 & 159 *supra*.

[164]FEDERAL MONITOR REPORT, Dec. 18, 1973, at 2:

Food service facilities are poor, both for the preparation and serving of food . . . . Food is adequate in amount but lacks variety, is unattractive and tasteless. Salads and fresh fruit are rarely served.

Ranges and ovens scarcely meet needs and some are in poor condition.

[165]The breadth of the problems with the long-range planning cited by the monitor supports this conclusion. FEDERAL MONITOR REPORT, Oct. 4, 1973, at 20-22:

Mississippi law hamstrings the efficient planning of correctional facilities in that it specifies that housing units should be located one mile apart and in no event may they be closer than two-fifths of a mile. In consequence, a large fenced area enclosing about three sections of land is proposed.

. . . .

From an operational point of view, the proposed plan has many weaknesses and I question whether the State of Mississippi can afford the operational costs. . . . The multitude of small, separate housing units alone would consume a large amount of manpower. The wide separation of the numerous units will require considerable manpower and much transportation for the movement of inmates. . . . Constructing the new facilities in three phases will add to costs. . . .

. . . .

I recommend that the present plans be reconsidered. Neither the Penitentiary Board nor the administration has been consulted as to the needs; rather, the Building Commission has come to them telling them what they can have. In my opinion, a total master plan should be developed, including professional review, before construction starts. I would hope that much of the construction could be performed by the inmates to provide useful work and training; however, it is doubtful that this will occur as modular precast construction has been specified.

[166]FEDERAL MONITOR REPORT, Dec. 15, 1973, at 14:

The layout of the physical plant with many detached and remote facilities

struction of an additional Maximum Security Unit, already underway, does not bode well for alteration of the prison's history.[167]

In summary, the emphasis of corrective measures intended by the court to improve the living conditions and safety of Mississippi's prison population remains deeply rooted in the principles of security, rather than creative, human rehabilitation and treatment. Because of this regrettable misplacement of priorities, it would seem ingenuous at best to predict an improvement in the physical facilities at Parchman as a result of the *Gates* directives.

Within the ambit of the eighth amendment attack on physical facilities, plaintiffs in *Gates* sought an extensive and definitive ruling as to the quantity and quality of prisoners' diets at Parchman.[168]

The court recognized the problem:

> Kitchen facilities and food service are below par . . . . [Inmates are denied] wholesome food prepared under sanitary conditions . . . . The deprivation of basic human needs for housing, food, and medical care is not merely unnecessarily cruel and unusual, but it is calculated to retard, if not prevent, the process of a prisoner's rehabilitation.[169]

Despite the factual background recognized by the court regarding inadequate food provisions at Parchman, it omitted ordering any relief in this regard,[170] and unsatisfactory food remains a complaint of prisoners at Parchman today. The federal court has ignored demands for a minimum and sufficient diet to meet daily nutritional needs. Such demands certainly are not unwarranted; they are merely a reiteration of a

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consumes excessive manpower for supervision and movements. Also it limits access of many inmates to programs while requiring the utilization of an excessive number of vehicles for limited transportation. In addition, the layout increases food costs, and makes it difficult, if not impossible, to serve attractive, palatable food.

[167] *Id.* Oct. 30, 1973, at 19. The monitor concluded: "Finally, with reference to the proposed plans, I will definitely state that a 192 man maximum security unit is not needed . . . ."

[168] Concern for adequate food and water is not novel or unique to Parchman prisoners. For instance, part of the tragedy of the Attica disturbances in September 1971 surfaced because of ignored demands for a proper diet. The Attica inmates' first demand was for adequate food and water; the demand of November 15 was more specific: "Provide a healthy diet, reduce the number of pork dishes, increase fresh fruit daily." Besharov & Mueller, *The Demands of The Inmates of Attica State Prison and The United Nations' Standard Minimum Rules For the Treatment of Prisoners: A Comparison*, 21 BUFF. L. REV. 839 at 842 (1972).

[169] 349 F. Supp. at 888, 894.

[170] The court did order the "employment of additional personnel" for food service specified by the Interim Committee's Report. *Id.* at 903. The court also prescribed a minimum 2,000-calorie intake for inmates while confined at the Maximum Security Unit. *Id.* at 900.

basic constitutional right within the prison context.[171]

Most recently, the federal monitor added credence to the prisoners' complaints regarding food quality. The monitor's report illustrates the striking omission of the district court in failing to remedy this existing unconstitutional condition:

> I observed a noon meal at Camp 1 and it was the worst food I have seen at the penitentiary. It was poorly cooked, gummy, unattractive and consisted only of three vegetables, bread and beverage—milk is plentiful. That same day all of the other camps visited had beef liver in addition to the vegetables, but Camp 1 had not received a meat ration. The poor preparation of the food was partly due to inadequate equipment. The range at Camp 1 is worn out and may be dangerous to use. There are two ovens but one is inoperable and even temperatures cannot be maintained in the other. The camp sergeant stated that he had reported the situation repeatedly but that no action had been forthcoming.[172]

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[171]Courts have recognized the constitutional claim that an inadequate diet within a penal system is an eighth amendment deprivation. Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (ordering prompt delivery of hot food, observance of minimum nutrition standards, and sanitary preparation); Hamilton v. Schiro, 338 F. Supp. 1016 (1970), *relief granted*, Hamilton v. Landrieu, 351 F. Supp. 549 (E.D. La. 1972) (ordering additional staff, delivery of hot food in closed containers, and professional consultant); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (ordering "sanitary and palatable" food served).

*See also* UNITED NATIONS STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS 20(1) (1955) which provides:

> Every prisoner shall be provided by the administration at the usual hours with food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.

Unfortunately, some courts in the past have permitted "limited" or "restricted" diets. Ford v. Board of Managers, 407 F.2d 937 (3d Cir. 1969); Negrich v. Hohn, 379 F.2d 213 (3d Cir. 1967); Landman v. Peyton, 370 F.2d 135 (4th Cir. 1966); Belk v. Mitchell, 294 F. Supp. 800 (W.D. N.C. 1968); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962). More recently courts have ruled that such "limited" or starvation diets are unconstitutional. Dearman v. Woodson, 429 F.2d 1288 (10th Cir. 1970) (starvation for 50½ hours held excessive punishment); Landman v. Royster, 333 F. Supp. 621, 647 (E.D. Va. 1971) (700 calorie bread and water diet ruled unconstitutional).

[172]FEDERAL MONITOR REPORT, Oct. 4, 1973, at 17. *See also id.* Oct. 30, 1973, at 20-21, where dietary problems were described thus:

> I found the dietician to be knowledgeable and believe that he is doing a good job under difficult circumstances. He pointed out how hard it is to serve good food at so many locations with poor equipment and untrained inmate workers. . . .
>
> He plans his menus on a sound poundage basis but cannot always adhere to dietetic principles. He complained that while he orders the foodstuffs to be delivered, he has no control over what is actually furnished.

The monitor's final report offers the following conclusions with respect to the existing food situation at Parchman:

> Food service facilities are poor, both for the preparation and serving of food. Ranges and ovens scarcely meet needs and some are in poor condition. There are no dishwashers to properly sanitize trays and utensils and functioning steam tables are a rarity. The inmates are furnished only spoons and have difficulty in eating foods, such as meats. Generally picnic type tables with attached benches are found in the dining rooms and many of these are not clean. Kitchen floors are not tiled, most are porous concrete and adequate sanitation is not possible. Garbage is collected in open, rusty drums which are not sterilized when emptied. Food is adequate in amount but lacks variety, is unattractive and tasteless. Salads and fresh fruits are rarely served.[173]

### d. Protection of Inmates

In regard to inmate protection, the district court found three conditions at Parchman which constituted violations of the eighth amendment:

> The defendants have subjected the inmate population at Parchman to cruel and unusual punishment by [1] failing to provide adequate protection against physical assaults, abuses, indignities and cruelties of other inmates, [2] by placing excessive numbers of inmates in barracks without adequate classification or supervision, and [3] by assigning custodial responsibility to incompetent and untrained inmates . . . .[174]

#### (1) Classification and Assignment

The heterogeneous composition of prisons,[175] mandates classification and separation of inmates according to the personality and psychology of the individual as well as the nature, cause, and method of the crime committed.[176] This classification aids in the rehabilitation of inmates, greatly lessens the dangers of physical assault, and effects a

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[173]*Id.* Dec. 15, 1973, at 2.

[174]349 F. Supp. at 894.

[175]"One of the few agreed upon 'facts' in the field of corrections is that offenders are not alike; that is, they differ from each other, not only in the form of their offense, but also in the reasons for and the meaning of their crime." M. WARREN, CLASSIFICATION OF OFFENDERS AS AN AID TO EFFICIENT MANAGEMENT AND EFFECTIVE TREATMENT 4 (1967).

[176]The types of offenses have been broken down into six general groups: traffic offenders; sex criminals; drunkards; criminals who commit a wide range of antisocial acts; those who commit crimes against property; and those who commit crimes against persons. Different treatment plans *were* recommended for each type. *Id.* at 19, *citing* W. MCCORD, J. MCCORD, & I. ZOLA, ORIGINS OF CRIME 185-86 (1969).

cumulative amelioration by lessening tension and by restoring a certain degree of trust among prisoners.[177]

Consistent with the state's history of operating its prisons for profit and the corollary callous indifference to inmate welfare, it is not surprising that the penitentiary operated virtually without a classification system until very recently.[178]

The *Gates* court found that there was "failure to properly classify and assign inmates to barracks" with a resultant comingling of violent and nonviolent inmates.[179] The court indicated that the lack of proper classification contributes to the widespread assaults. Classification, however, has far more extensive effects than this.

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[177]In Morris v. Travisono, 310 F. Supp. 857, 865 (D.R.I. 1970), the court stated:

> Classification . . . contributes to a smoothly, efficiently-operated correctional program by the pooling of all relevant information concerning the offender, by divising [*sic*] a program for the individual based upon that information, and by keeping that program realistically in line with the individual's requirements. . . .
>
> The primary objective of classification as a systematic process is the development and administration of an integrated and realistic program of treatment for the individual.

[178]At the time *Gates* was filed, B.C. Ruth had been Parchman's "Classification Officer" for 14 years. Gates v. Collier, No. GC 71-6-K, Deposition of B.C. Ruth, September 22, 1971, at 3-5. Mr. Ruth's testimony clearly exposes the racist assignment of inmates:

> Q: Are there facilities within the Women's Camp which are comparable to the First Offender Camp, Maximum Security Unit, Multiple Offender Camp, the trouble-maker camps that you have mentioned?
>
> Are they separated by characteristics at all within that camp?
>
> A: (Mr. Ruth): Nothing except the white girls sleep in a separate apartment from the colored.
>
> Q: No effort to keep a three-time loser who's a murderer separate from the first offenders?
>
> A: No, sir.

*Id.* at 63-64.

Regarding the rules or regulations that the classification officer based his decisions upon:

> Q: Do you have any rules or regulations in written form which serve as your guidelines or criteria for assigning a particular inmate to a particular camp?
>
> A: (Mr. Ruth) No, no, we don't.
>
> Q: Do you have any oral directives which serve as such guidelines?
>
> A: (Mr. Ruth) We don't have any set rules or guidelines to go by at all assigning these men.

*Id.* at 6-7.

The only overriding objectives or guidelines that the classification system followed was to ensure that black inmates were classified to "black camps" and that white inmates were classified to "white camps."

[179]349 F. Supp. at 888.

> Viewing the situation from the inmate's position, it is clear that the classification he is given is a primary factor in determining many practical day-to-day aspects of his life within the institution. Among other matters, it may dictate what section of the institution he will live in, who his associates will be, what work assignment he will have, and what privileges will be extended to him. In many systems classification goes beyond these determinations to fundamental decisions about an inmate's future, such as the character of the institution he will be incarcerated in, and the probability of a favorable parole decision.[180]

The district court's prescription for a classification system for Parchman is deficient in several areas. No strict guidelines were offered; there is merely a suggestion of conformity with the standards of the American Correctional Association.[181] The procedural aspects of classification, in order to be effective, are of necessity complex,[182] and the court's failure to act decisively[183] in this area has lent itself to post-*Gates* problems and further litigation involving the classification of inmates.

Absent meaningful standards or guidelines in *Gates*, the Classification Committee in an effort to undo the effect of years of indifference to classification at Parchman proceeded to reclassify all 2,000 inmates

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[180]SOUTH CAROLINA DEPT. OF CORRECTIONS, THE EMERGING RIGHTS OF THE CONFINED 174 (1972).

[181]349 F. Supp. at 901-02:

> CLASSIFICATION AND ASSIGNMENT OF INMATES
>
> Defendants also shall, not later than December 20, 1972, file with the court a proposed program for the classification and assignment of all inmates taking into account special circumstances, viz:
>
> (a) The necessity for the early desegregation of the penitentiary;
>
> (b) The necessity of alterations and additions to existing facilities to provide adequate inmate protection;
>
> (c) The interest of the penitentiary officials in implementing additional honor camps.
>
> Said program of classification and assignment shall be racially nondiscriminatory, shall contemplate modern methods conforming generally with classification standards of the American Correctional Association, and shall provide for its full effectuation within 4 months from the date of the submission, but in no event later than April 20, 1973; provided however, that the court may grant reasonable extensions of time for good cause shown because of special exigencies.

[182]*Compare* Morris v. Travisono, 310 F. Supp. 857, 865-75 (D.R.I. 1970), where the court required that prison officials adopt administrative procedures which ensure safeguards and accountability in the classification process. Limited review was provided to ensure reasonable, consistent procedures. *See also* J. CONRAD, CRIME AND ITS CORRECTION 176-212 (1965); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 227, 229-30 (1970); East, *Penal Classification*, 35 J. CRIM. L.C. & P.S. 93 (1944); Comment, *Administrative Fairness in Corrections*, 1969 WISC. L. REV. 587, 589-93.

[183]The Mississippi Legislature has acted to establish the rudiments of a classification system at Parchman. *See* MISS. CODE ANN. §§ 47-5-99 to -103 (Supp. 1973).

at the Penitentiary in a short 4 months. In fact 1,000 inmates were classified within 8 working days.[184] Such summary and inadequate treatment of the classification process is the direct result of a myopic judicial order which failed to establish proper classification guidelines.[185]

The recent decision of *Leonard v. Mississippi State Probation and Parole Board*[186] is further indication that the classification process after the *Gates* decision is not functioning properly or even constitutionally.

Defendants included the superintendent, the penitentiary board, the penitentiary itself, and the probation and parole board. This case marks the first time that all agencies connected with the penitentiary were successfully joined in one suit.

Prior to bringing suit, plaintiffs in *Leonard* were denied parole, denied eligibility for work-release and classified or reclassified for camp assignments and vocational and educational programs in whole or in part on the basis of defective records which included reports based on unconstitutional disciplinary measures. Defendants were ordered by the court to reconsider each inmate for (a) parole, (b) work release, and (c) classification where the records were used. Had the Classification Committee been given more definitive guidelines in *Gates,* including the directive to refrain from utilizing pre-*Gates* disciplinary records, it would not face the present task of reclassifying hundreds of inmates pursuant to the *Leonard* decree. Moreover, had a more professional committee been established, utilization of defective *Gates* records would never have occurred.

### (2) Elimination of Custodial Trusties

The use of trusties as armed guards at Parchman is yet another facet of Mississippi's historic philosophy of prison-for-profit. Moreover, the trusty system has not only served as a means to reduce expenditures for civilian staffing but has also been used as a vehicle to maintain a high degree of fear among the inmate population.[187]

The court found in *Gates* a record replete with instances of injuries and abuses inflicted by inmates acting as armed guards and performing other custodial duties at Parchman.

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[184]Gates v. Collier, No. GC 71-6-K, Deposition of Larry Maddox, April 25, 1973, at 60-62.

[185]The federal monitor has acknowledged the failures and shortcomings of the classification system. FEDERAL MONITOR REPORT, Oct. 30, 1973, at 14; *id.* Sept. 15, 1973, at 13; *id.* Sept. 2, 1973, at 8.

[186]No. GC 73-46-S (N.D. Miss., Feb. 21, 1974).

[187]The Interim Report concluded: "[S]ecurity and control of inmates are insured through maintaining a high degree of fear within the inmate population." INTERIM REPORT, *supra* note 65, at 2.

> Trusties have abused their position to engage in loan-sharking, extortion and other illegal conduct in dealing with inmates subject to their authority and control. The evidence indicates that the use of trusties who exercise authority over fellow inmates has established intolerable patterns of physical mistreatment. For example, during the Cook administration 30 inmates received gunshot wounds, an additional 29 inmates were shot at, and 52 inmates physically beaten.[188]

Further, the court found that:

> Payoffs, favoritism, extortion and participation in illegal activities have influenced the process of recommending and selecting trusties; no formal training program at [Parchman] exists for training trusties . . . inmates have, on many occasions, suffered injuries and abuses as a result of the failure to select, train, supervise, and maintain an adequate custodial staff.[189]

Based on these findings the court ordered prison officials to end within 60 days the use of trusties as armed guards in the fields and as custodial officers in the Maximum Security Unit.[190] Prison officials were further ordered to prepare a plan for the termination of the use of trusties and other designated classes of inmates[191] as armed guards or in other custodial capacities at the prison.[192] Thus *Gates* abolished the trusty system insofar as eliminating armed and custodial trusties.[193] This por-

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[188]349 F. Supp. at 889.

[189]*Id.* The court found that many trusties had been convicted of violent crimes, and that penitentiary records indicated "that of the armed trusties serving as of April 1, 1971, 35% had not been psychologically tested, 40% of those tested were found to be retarded, and 71% of those tested were found to have personality disorders." *Id.*

[190]*Id.* at 902-03.

[191]*Id.* at 888-89. These classes of inmates are referred to as "hallboys," "cagebosses," and "floorwalkers" who may or may not be trusties. Inmates designated as a "hallboy," "cageboss," or "floorwalker" police inmates and enforce discipline while inmates are confined within the barracks or living quarters.

[192]In addition to performing duties as field shooters, armed trusties were utilized to guard the perimeters of the camps, to serve as "night shooters," to guard special work details, apprehend escapees, and to transport prisoners within and without the confines of Parchman. *Id.* at 889.

[193]*Gates*, however, did not order the complete elimination of the trusty system as the prison may continue to use trusties to perform certain noncustodial duties. The Mississippi Legislature has adopted a plan which would phase out the current trusty system by July 1, 1974. MISS. CODE ANN. § 47-5-143 (1972).

The court's elimination of armed trusties and custodial trusties is in direct conflict with MISS. CODE ANN. § 47-5-143 (1972), which allows trusties to be used "to guard inmates and to supervise prison work details." In reality, the district court enjoined a state statute without resort to a three-judge court. Compare this portion of the ruling with the district court's refusal to enjoin the "whipping and lashing" statute and "dark hole" due to the three-judge court issue.

tion of the order is consistent with the relatively few judicial decisions in this area.[194]

Fortunately, unlike other areas of the *Gates* judgment, the court has steadfastly ensured the complete implementation of its order with respect to the abolition of armed and custodial trusties.

On July 18, 1973, prison officials petitioned the court to modify the *Gates* order to expand the use of armed trusties on a temporary basis at Parchman. The State's request was based upon "security problems" within and outside the penitentiary.[195] The district court denied the request, stating that Mississippi had failed to utilize all of its resources to "work itself out of the Parchman dilemma." The court concluded:

> [I]n good conscience [the court could not reverse] the fundamental proposition that the state cannot imprison a person convicted of a crime and place him under control of another person convicted of a crime. Unless this court is reversed by a higher court, the *trusty system is gone forever in this State.*[196]

### (3) Protection from Assault

A person's right to be protected from assault and injury is a fundamental human right and should not be reduced as a consequence of one's incarceration. To the extent that the state has deprived the prisoner of his ability to protect himself from physical deprivations by assuming the position of custodial control over the prisoner, and to the extent that the state has taken away the prisoner's right to choose with whom he is to

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[194]The use of trusties as guards exists officially only in Arkansas, Louisiana, and Mississippi. Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971). Many prisons utilize inmates in positions of authority, however, and their use creates special problems. *See, e.g.*, S. Fox, Analysis of Prison Disciplinary Problems in Penology: A Realistic Approach 114-26 (C. Vedder & B. Kay 1969).

The most comprehensive judicial inquiry into a trusty system prior to *Gates* came in *Holt*, where the Arkansas practice of delegating over 90 percent of the prison's functions to trusties was declared unconstitutional. 309 F. Supp. at 382. The court ordered that all trusties be brought under control of civilian employees and that trusties be "stripped of their authority over the lives and living conditions of other convicts." *Id.* at 384.

In Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970), the court permitted the continued use of trusties to perform limited nonsecurity functions on death row at the Louisiana State Penitentiary. In Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971), the court reduced the number but did not enjoin the use of trusties. However, the court noted that "[t]he trusties, of course, have no weapons" and do not perform jailor or security functions. *Id.* at 1195 n.5.

[195]Gates v. Collier, No. GC 71-6-K, Prison Officials' "Motion to Modify", July 18, 1973.

On July 3, 1973, the court had permitted prison officials to reintroduce the use of 25 armed trusties for a 60-day period to be used as perimeter guards stationed at the various camps at Parchman. *Id.* Order of July 3, 1973.

[196]Gates v. Collier, No. GC 71-6-K, Oral Order of August 15, 1973 (emphasis added).

live, where he is to live, and how he is to live, then to the same extent that state must assume an obligation to ensure the inmate's continued physical security.

Unfortunately our prisons have failed to do this. Whole human beings who enter prison institutions leave as amputees, quadraplegics, and victims of repeated rape—injuries from which they will never physiologically or psychologically recover.[197]

Parchman's history is replete with the infliction of assaults by inmates and free world civilians upon inmates. In *Gates,* the court noted that"at least 85 instances are revealed by the record where inmates have been physically assaulted by other inmates. Twenty-seven of these assaults involved armed attacks in which an inmate was either stabbed, cut or shot."[198] Based upon these findings, the court, relying upon the

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[197]Recent publicity has even made the public aware of these conditions. The recently released interim report of the LEAA sponsored NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS 32 (1973), states:

> Observers of correctional institutions agree that inmate attacks on one another—often sexually motivated—are common place and facilitated by lack of personal supervision or lack of concern on the part of supervisory personnel.

For documentation of the existence of personal dangers to inmates see Perez v. Turner, 462 F.2d 1056 (10th Cir. 1972) (description of seven sexual assaults during an 18-month period in the Utah State Prison); Holt v. Sarver, 300 F. Supp. 825, 830-31 (E.D. Ark. 1969) (description of attacks in dormitories in Arkansas prison); Davis, *Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans,* 6 TRANS-ACTION 6 (1968); Hirschkop & Milleman, *The Unconstitutionality of Prison Life,* 55 VA. L. REV. 795 (1969); *Sexual Assaults and Forced Homosexual Relationships in Prison: Cruel and Unusual Punishment,* 36 ALBANY L. REV. 428 (1972); Note, *Prisoners' Rights: Personal Security,* 42 COLO. L. REV. 305 (1970).

For the special problem of prison officials when inmates request solitary confinement because of fear of assaults, see Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972).

[198]349 F. Supp. at 889. Plaintiffs' uncontested findings of fact reveal:

> a) *Potential damage claims arising out of inadequate measures to protect inmates from assaults and rape by other inmates:*
>
> 79 named and documented incidents of stabbings, beatings, rapes, etc. (Page 22-31, Paragraph 13-84);
>
> b) *Potential damage claims for cruel and unusual treatment at Maximum Security Unit*:
>
> 35 named inmates beaten and maced. (Pages 100-109, Paragraphs 2-18). Not specified: number of inmates suffering as a result of prolonged dark hole confinement, laxatives, handcuffing to bars, starvation, diets, etc.

Gates v. Collier, No. GC 71-6-K, Plaintiffs' Proposed Findings of Facts, June 1972.

Plaintiff-intervenors, the United States Government submitted the following statistics regarding inmate brutality, forming the basis of the *Gates* order:

> a) *Potential damage claims for shootings*:
>
> 34 such claims; this includes only shootings when the inmate was *hit* by the bullet or pellet. (Pages 40-68).
>
> 159 persons interviewed or giving statements to FBI or Justice concerning above.
>
> b) *Potential damage claims for other cruel and unusual treatment:*

eighth amendment,[199] "enjoined and commanded" state prison officials "to increase the protection of inmates from the assaults of fellow inmates" within 60 days. The court recognized that "adequate protection to inmates" would require "the assignment of additional employees," and "substantial funds" to the problem. The court also recognized its duty "to make certain that such steps are not only begun with reasonable promptitude but are fully carried out."[200]

Other courts have recognized a "right to protection" founded upon the 8th or 14th amendments within the prison context. Many of these decisions are based, as in *Gates,* upon a totality of prison conditions which contribute to and foster inmate assaults.[201]

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56 laxatives, hanging from bars, torture, coke crate punishment, torn up mail, etc. (Pages. 95-118).

59 interviews or statements.

c) *Potential damage claims arising out of failure to protect inmates:*

60 incidents

86 interviews.

Gates v. Collier, No. GC 71-6-K, United States Answer to Interrogatories, June 1972. *See also* note 91 *supra.*

These statistics are understated in that they do not include murders of inmates such as the celebrated case of the death of Danny Calhoun Bennett. *See* Gilmer v. State, 271 So. 2d 738 (Miss. 1973) (affirming murder conviction of J.C. Gilmer for death of Danny Bennett); McLaurin v. State, 260 So. 2d 845 (Miss. 1972) (affirming murder conviction of George McLaurin for death of Danny Bennett).

[199]"The defendants have subjected the inmate population at Parchman to cruel and unusual punishment by failing to provide adequate protection against physical assaults, abuses, indignities and cruelties of other inmates." 349 F. Supp. at 894.

[200]*Id.* at 897. In order to eliminate inmate assaults, the court additionally ordered the immediate reduction in the overcrowded barracks by temporary means; institution of a system to reduce possession of weapons by inmates; assignment of three civilian guards to each barrack during the night hours; prohibition of fighting and gambling; isolation of violent inmates; and prompt reporting of inmate assault and other violence to the County Prosecuting Attorney of Sunflower County. *Id.* at 902.

[201]In a Civil Rights Act case decided 80 years ago, the United States Supreme Court ruled that federal prisoners have a *constitutional* right to be protected from "lawless violence," "assault," and "bodily harm." Logan v. United States, 144 U.S. 263, 285 (1892). That constitutional right did "not depend upon any of the amendments to the Constitution," but was a right inherent in the very concept of constitutional government. *Id.* at 294.

In Hamilton v. Love, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971), the court ruled that "minimally, a detainee ought to have the reasonable expectation that he would survive his period of detainment with his life; that he would not be assaulted, abused or molested during his detainment." *Id.* at 1196. The court indicated that in order to protect the lives and safety of the detainees, the defendants would have to add additional personnel or reduce the jail population.

In Holt v. Sarver, 309 F. Supp. 362, 382 (E.D. Ark. 1970), the court issued a declaratory judgment that the "conditions" in the Arkansas prison system amounted to "a cruel and unusual punishment constitutionally prohibited." One of those conditions was widespread assault and injury. In announcing "guidelines" for "minimum requirements" the

As conditions presently exist at Parchman—open dormitories, a nascent classification system, limited physical security, myriad potential hiding places, untrained and ineffective civilian guards, the ready availability of materials which can be converted into weapons, and the remnants of a trusty system which pit inmate against inmate—assaults by inmates and civilians upon other inmates will continue. The order in *Gates* in the area of protection from assaults is of such a general nature as to allow a large degree of circumvention. The history of penal reform in Mississippi dictates a more detailed and complete order with less allowance of administrative discretion and a stronger judicial concern with enforcement of its judgment.

The right to protection from bodily harm may be enforced through means other than broad class action *Gates*-type injunctive relief. Prisoners may bring actions for monetary damages based upon denial of their constitutional right to protection. These lawsuits represent a mechanism for prison reform as the prison administration faces the economic consequences of continued fostering of inmate and prison civilian brutality. This litigation is perhaps the only way to protect prisoners in Mississippi.[202]

The expanded application of the eighth amendment includes the awarding of damages as well as equitable and injunctive relief.[203] Crucial

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court said the defendants were "going to have to do more than they have done in the past . . . about protecting inmates from violent assaults of whatever kind." *Id.* at 383-84.

*See also* Woodhaus v. Commonwealth, 487 F.2d 889 (4th Cir. 1973); Laaman v. Hancock, 351 F. Supp. 1265 (D.N.H. 1972); Jones v. Wittenberg, 323 F. Supp. 93, 330 F. Supp. 707 (N.D. Ohio 1971), *aff'd sub nom.* Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972); Cohen v. United States, 252 F. Supp. 679 (N.D. Ga. 1966).

[202]*See, e.g.*, Bogard v. Cook, Civ. No. GC 73-22-S (N.D. Miss.). On March 24, 1974, the District Court overruled defendants' motions for dismissal and summary judgment. A jury trial is scheduled for mid-summer 1974. In 1971, Bogard, a Parchman inmate, was shot by trusties. In 1972, he was stabbed by a fellow inmate and left a paraplegic both as a result of the stabbing and because of inadequate medical care. He sued under 42 U.S.C. § 1983 (1953) and also maintained state tort claims under pendent jurisdiction.

Some nine other prisoner damage actions have been filed in Federal District Court in the Northern District of Mississippi and have been stayed pending disposition of the *Bogard* case.

[203]The Fifth Circuit recognized in Roberts v. Williams, 456 F.2d 819, 828 (5th Cir.), *cert. denied sub nom.* Roberts v. Smith, 404 U.S. 866 (1971), that the standards for measuring an eighth amendment claim do not depend upon the relief that is sought. The court stated: "In forming a definition of 'cruel and unusual punishment' it should make no difference whether the litigation before the court under § 1983 is brought for injunctive or declaratory judgment or attempts to assess personal tort liability." Damages have been awarded prisoners in several cases involving a continual infliction of harm: Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971) ($1,500 damage awarded for punitive segregation of an inmate under conditions constituting cruel and unusual punishment); Wright v. McMann, 387 F.2d 519 (2d Cir. 1967), *remand on damages*, 321 F. Supp. 127 (N.D.N.Y. 1970) ($9,000 damage award); Bracey v. Grenoble, 356 F. Supp. 673 (E.D. Pa. 1973)

to such cases is the concept that prison officials are not only financially liable for direct assaults upon inmates by prison employees as a traditional civil rights claim[204] but that inmate assaults by other inmates can, under certain circumstances, be a direct result of poor management or indifference by prison administrators.[205] Thus in either case—civilian attack upon inmate or inmate attack upon inmate—prison officials will be held financially responsible for their failure to protect those who suffer injury.

The violation of the basic constitutional right to protection is not a matter to be taken lightly, particularly where the conditions which create the problem have existed for years and continue to affect hundreds of prisoners within Parchman. While the district court in *Gates* has moved to fill the vacuum created by the inaction of prison officials in the State of Mississippi and has attempted to inject some significant

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($2,500 damages awarded inmate who was beaten, stripped, and pushed down a flight of stairs).

[204]Financial liability of high echelon prison officials, including the superintendent, for assaults by prison employees upon inmates is based on several theories. In Roberts v. Williams, 456 F.2d 819, *cert. denied*, 404 U.S. 866 (1972), the superintendent of the Leflore County Mississippi penal farm was held liable for injuries sustained by a juvenile prisoner when the minor was shot in the face by the accidental discharge of a shotgun held by a trusty guard. The superintendent's liability was predicated upon his negligence in failing to adequately train and supervise the trusty guard as to handling firearms. *See also* Anderson v. Nosser, 438 F.2d 183 (5th Cir. 1971), *modified on reh. en banc*, 456 F.2d 835 (1972) (Parchman's superintendent not immune from damages for constitutional deprivation of inmates or detainees). Mississippi law imposes a duty on a sheriff having custody of a prisoner to exercise ordinary and necessary care for the preservation of his prisoner's life and limb, and for a breach of this duty he is liable. Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528, 531 (1955). By state statute, the superintendent is vested with the *exclusive* management and control of Parchman, including the *treatment, care*, and management of all prisoners. Miss. Code Ann. § 47-5-23 (1972) (emphasis added). The Mississippi Supreme Court has acknowledged the superintendent's exclusive control over the prison system and its inmates. Morgan v. State, 236 So. 2d 741 (Miss. 1972). *See also* Harris v. State, 118 N.J. Super. 384 (1972); City of Topeka v. Boutwekk, 35 P. 819, 822 (Kan. 1894); Restatement Second of Torts § 320 (1965).

[205]In Roberts v. Williams, 456 F. 2d 819, *cert. denied*, 404 U.S. 866 (1972), the Fifth Circuit held that cruel and unusual punishment may be based upon either specific intent or negligence in prison management. Both criteria are satisfied when one of the following circumstances is present: (a) "a conscious purpose to inflict suffering," (b) "the sustained maintenance over a period of time of a needlessly hazardous condition," or (c) "a callous indifference to [suffering] at the management level, in the sustained knowing maintenance of bad practices and customs." *Id.* at 827; *cf.* Woodhaus v. Virginia, 487 F.2d 889, 889-90 (4th Cir. 1973) ("occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, [however,] confinement in a prison where violence and terror reign is actionable" against the prison administration); Laaman v. Hancock, 351 F. Supp. 1265 (E.D. Va. 1972). *But see* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Kish v. County of Milwaukee, 441 F.2d 901 (7th Cir. 1971); Matthews v. Henderson, 354 F. Supp. 22 (M.D. La. 1973).

changes into those prison practices and conditions found to be inadequate, the court has failed to articulate a final ultimatum. If Mississippi cannot ensure the safety of its prisoners at Parchman, then it should not be allowed to run a prison.

2. Fourteenth Amendment—Due Process: Inmate Discipline

The area of the greatest litigation in the law of corrections involves the continuing dispute over what type of disciplinary measures may be used in order to maintain prison discipline and security and what procedures must accompany the imposition of these sanctions.[206]

Apart from procedural protections, the judiciary has recognized that due process requires the promulgation of substantive rules of conduct with communication of these to the inmate population.[207] The establishment of set rules and regulations offers fair warning to prisoners of that conduct which risks severe disciplinary punishment.

The district court in *Gates* found that no rules and regulations had ever been officially promulgated and communicated to inmates apprising them of "what conduct can subject [them] to serious discipline, what penalty [they] can expect and the procedure by which such determination will be made."[208] The court enjoined the prison administration from imposing any disciplinary punishment until comprehensive rules and regulations governing inmate conduct were established.[209]

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[206]On due process in prison disciplinary proceedings, *see, e.g.*, Haines v. Kerner, 404 U.S. 519 (1972); United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); Dodson v. Haugh, 473 F.2d 689 (8th Cir. 1973); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Castor v. Mitchell, 355 F. Supp. 123 (W.D.N.C. 1973); Gomes v. Travisono, 353 F. Supp. 457 (D.R.I. 1973); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS, standard 212 (1973); S. KRANTZ, *et al.*, MODEL RULES AND REGULATIONS ON PRISONERS' RIGHTS AND RESPONSIBILITIES (1973) [hereinafter cited as MODEL RULES]; Milleman, *Prison Disciplinary Hearings and Procedural Due Process—The Requirement of a Full Administrative Hearing*, 31 MD. L. REV. 27 (1971); Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Right Litigation*, 23 STAN. L. REV. 473 (1971); 50 TEXAS L. REV. 155 (1971). *See also* Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), *vacated and remanded*, 491 F.2d 417 (5th Cir. 1973) (en banc); McDonnell v. Wolff, 342 F. Supp. 616 (D.C. Neb. 1973), *cert. granted*, 42 U.S.L.W. 3422 (Jan. 22, 1974); Nelson v. Heyne, 355 F. Supp. 451 (N.D. Ind. 1972); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Clutchette v. Procunier, 328 F. Supp. 767 (N.D. Cal. 1971); Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970), *rev'd in part*, 460 F.2d 126 (2d Cir. 1971), *cert. denied*, 409 U.S. 885 (1972); Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

[207]*See, e.g.*, Rhem v. McGrath, 320 F. Supp. 691 (S.D.N.Y. 1971); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971); Urbano v. McCockle, 334 F. Supp. 161 (D.N.J. 1971); Smoake v. Fritz, 320 F. Supp. 609 (S.D.N.Y. 1970).

[208]349 F. Supp. at 895.

[209]*Id.* at 899.

Not only must certain rules be in force and followed, but punishment of an inmate may proceed only after a fair correctional disciplinary hearing. It is in this context that the procedural requirements of the 14th amendment due process clause ensure a constitutional hearing.

One of the most obvious shortcomings of the *Gates* order was its ruling on the due process rights of a fair disciplinary hearing.[210] In its findings of fact, the district court in *Gates* found a total absence of procedural safeguards at Parchman's discipline hearings.[211]

The court's order, however, requires only that: (a) an inmate may not be punished except for conduct which violates an existing penitentiary rule or regulation; (b) the inmate receive a written notice of the charge against him at least 24 hours prior to the hearing; and (c) the inmate be afforded an opportunity to appear before the hearing body and respond to the charges.[212] The order expressly rejects rights recognized by other courts which are necessary to give an inmate a fair and constitutional disciplinary hearing. These rejected safeguards include availability of counsel or counsel substitute;[213] the opportunity to cross-

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[210]Plaintiff-inmates appealed that portion of the *Gates* judgment relating to inmate discipline hearings to the Fifth Circuit on February 23, 1973. The prosecution of the appeal was stayed pending the disposition of Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), *vacated and remanded*, 491 F.2d 417 (5th Cir. 1973) (en banc). In light of *Sands*, it appears that plaintiffs' appeal is mooted, and they must now seek a three-judge court to entertain the issues of disciplinary hearings. This was the only portion of the *Gates* order appealed, as of this date, by plaintiff-inmates.

[211]349 F. Supp. at 890-91.

[212]*Id.* at 899. The court in addition noted that the person bringing the charge could not serve on the disciplinary tribunal which conducts the hearing. The *Gates* decision literally adopts *verbatim* the procedural safeguards ordered in Sinclair v. Henderson, 435 F.2d 125 (5th Cir. 1970). In *Sinclair*, Judge West ordered: a) the promulgation of rules and regulations; b) written notice of charges; and c) a hearing affording the inmate the opportunity to speak. *Id.* at 1129.

[213]Johnson v. Avery, 393 U.S. 483 (1968), established the constitutional right of inmate "writ-writers" to render legal assistance to fellow prisoners. For decisions recognizing right to counsel-substitute at prison disciplinary hearings see Landman v. Royster, 333 F. Supp. 621, 653-54 (E.D. Va. 1971); Bundy v. Cannon, 328 F. Supp. 165, 176 (D. Md. 1971); Clutchette v. Procunier, 328 F. Supp. 767, 783 (N.D. Cal. 1971); Sostre v. Rockefeller, 312 F. Supp. 863 (S.D.N.Y. 1970); Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970).

The federal prisons allow an inmate charged with misconduct to have representation by a staff employee. UNITED STATES BUREAU OF PRISONS, POLICY STATEMENT: WITHHOLDING, FORFEITURE, AND RESTRICTION OF GOOD TIME, No. 7400.6 (Dec. 1, 1966).

*See also* Gagnon v. Scarpelli, 411 U.S. 778 (May 14, 1973) (counsel required in appropriate cases at probation or parole revocation hearings); Goldberg v. Kelly, 397 U.S. 254 (1970) (counsel or counsel-substitute at welfare hearings); Mempa v. Rhay, 389 U.S. 128 (1967) (counsel or counsel-substitute at revocation of probation of deferred sentencing hearing). In each of these cases, the Supreme Court authorized representation by counsel at hearings involving a quantum of personal liberty arguably no greater than that at stake in prison disciplinary proceedings. *See also* MODEL RULES, *supra* note 206, at 167-68.

examine accusers; the opportunity to present additional evidence;[214] a review procedure;[215] and special provisions for prisoners accused of in-prison felonies.[216] Plaintiffs in *Gates* have had to turn to another court

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[214]The right to confrontation, cross examination, and presentation of additonal evidence is accepted as being appropriate and necessary "in almost every setting where important decisions turn on questions of fact . . . ." Goldberg v. Kelly, 397 U.S. 254, 269 (1970). *See*, K. DAVIS, ADMINISTRATIVE LAW TEXT §§ 7.02, 7.05 (1959).

In Morrissey v. Brewer, 408 U.S. 471 (1972), the Court held that parolees are entitled to "minimum" standards of due process before parole may be revoked, and specified that the following constituted such minimum requirements:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officiers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

408 U.S. at 489. Essentially the same safeguards were described as "rudimentary" to due process in the Court's earlier decision in Goldberg v. Kelly, 397 U.S. 254 (1970). The "minimum" safeguards of *Morrissey* and *Goldberg* should also be the minimum required in prison disciplinary proceedings. *But cf.* United States *ex rel* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973).

The *Morrissey* and *Goldberg* rights should apply to prison discipline hearings due to the potential "grievous loss" that the prisoner can incur at the hearing. *See* United States *ex rel.* Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973); NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, CORRECTIONS standard 2.12 (1973) (requiring all of the "minimum" due process safeguards as specified in *Goldberg* and *Morrissey*); MODEL RULES, *supra* note 206, at 165-66; Brant, *Prison Disciplinary Procedures: Creating Rules*, 21 CLEVELAND ST. L. REV. 83, 93 (1972); Jacob, *Prison Discipline and Inmate Rights*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 227, 247 (1970).

[215]In Sands v. Wainwright, 357 F. Supp. 1062, 1090 (M.D. Fla. 1972) the district court although not mandating appeal procedures stated that a "review [appeal] can certainly result in a more considered exercise of power and in effect elimination of errors." *See* Wright v. McMann, 321 F. Supp. 127, 145 (N.D.N.Y. 1970). *See* MODEL RULES, *supra* note 206, at 168-69.

[216]While *Gates* provides for the reporting by the prison administration to the County Prosecuting Attorney of Sunflower County of all cases of inmate assault or other violence, 349 F. Supp. at 902, the court failed to consider special cases in which prisoners are accused of in-prison felonies. Many disciplinary offenses at Parchman also constitute crimes. Disciplinary offenses for assaults of guards, possession of weapons, liquor, or drugs, escape, etc. could result in criminal prosecutions. Courts have recognized and attempted to resolve this problem which in reality is created by the effect of Miranda v. Arizona, 384 U.S. 436 (1966), on prison disciplinary proceedings where the prison violation constitutes a felony. In Sands v. Wainwright, 357 F. Supp. 1062 (M.D. Fla. 1973), the district court recognized the dilemma of the inmate: "[If] he remains silent [at the prison discipline hearing] he sacrifices a valuable defense and risks a substantial and serious punishment. If he speaks in his defense, he risks self-incrimination in a subsequent criminal prosecution." *Id.* at 1093. *Sands* resolved the dilemma by entitling the inmate to "use" immunity in a subsequent criminal prosecution to the extent his statements at the prison discipline hearing can not be used affirmatively against him.

in order to ensure fairness in the prison disciplinary process,[217] and the loss endured by prisoners due to defective discipline hearings will result in hundreds of rehearings where parole or work-release eligibility has been denied and where inmates have been classified at Parchman based on such hearings.

The court's rejection of the *minimum* judicially accepted procedural rights at prison disciplinary hearings[218] not only constitutes a denial of 14th amendment rights as recognized by other courts but impedes inmate rehabilitation. Only when an inmate believes he has "gotten a fair shake" will he begin to confront his misconduct which in turn leads to the recognition of the need for his behavioral change—a process essential to rehabilitation.[219]

### 3. Fourteenth Amendment — Equal Protection: Racial Segregation and Discrimination

As previously stated, Parchman has traditionally operated its prison-plantation system on a racially segregated and discriminatory basis. It was thus no surprise when the district court found complete racial segregation and widespread discrimination in *Gates*:

> Approximately twice the number of blacks are required to live in the same amount of dormitory space as white inmates. Inmates are assigned to the 12 major residential camps on the basis of race. Inmates are assigned to work details according to race. Blacks have not been afforded the same vocational opportunities as have the white inmates. . . . Black inmates in some instances have been subjected to greater punishment or more severe discipline than have white inmates

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In Clutchette v. Procunier, 328 F. Supp. 767 (E.D. Va. 1971), the court ruled that when a disciplinary offense also constitutes a crime, the prisoner must be afforded counsel along with other procedural safeguards. *See also* Collins v. Hancock, 354 F. Supp. 1253 (D.N.H. 1973); Colligan v. United States, 349 F. Supp. 1233 (E.D. Mich. 1972); Carter v. McGinnis, 351 F. Supp. 787 (W.D.N.Y. 1972).

[217]Leonard v. Mississippi State Probation & Parole Bd., No. GC 73-46-S (N.D. Miss., Feb. 21, 1974). See text accompanying note 186 *supra*.

[218]349 F. Supp. at 893.

[219]The language of Justice Frankfurter is appropriate:

> The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. *No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.* Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 126, 171-72 (1951) (Frankfurter, J., concurring) (emphasis added.).

The feeling that justice has been done is no less important to prisoners at Parchman.

for similar infractions of penitentiary rules.[220]

Racial segregation of inmates in their living facilities affects not only their camp assignment but in turn results in segregation of work assignments as well as educational, vocational, and rehabilitative programs.[221]

Based on these facts, the court ordered that a comprehensive desegregation plan be drawn and submitted within 2 months of the decision and implemented not later than 4 months after submission.[222] Further, all forms of racial discrimination were immediately and finally enjoined.[223]

As late as 1967, it was noted that "racial discrimination in the prisons enjoys a surprising and tenuous immunity from judicial intervention."[224] Courts up until that point,[225] and in certain instances for some time after, acceded to prison administrators' arguments that racial integration would produce serious disciplinary problems.[226] With the demise of the "hands-off doctrine," however, there has been a "strong inclination to intervene and order staff officials to take affirmative steps

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[220]349 F. Supp. at 887. As of May, 1971, there were located within the existing 21 units at Parchman 12 permanent units which housed the following numbers of inmates, listed according to race:

| | | |
|---|---|---|
| Front Camp | 90 white | 0 black |
| First Offender's Camp | 116 white | 0 black |
| Camp B | 0 white | 148 black |
| Camp 1 | 0 white | 191 black |
| Camp 2 | 0 white | 162 black |
| Camp 4 | 85 white | 0 black |
| Camp 5 | 99 white | 0 black |
| Camp 6 | 133 white | 0 black |
| Camp 8 | 0 white | 117 black |
| Camp 10 | 0 white | 176 black |
| Camp 11 | 0 white | 160 black (approx.) |
| Governor's Mansion | 0 white | 8 black |

Gates v. Collier, No. GC-71-6-K, Stipulation No. 9, filed May 4, 1972.

[221]"An inmate's classification determines his work duties, his living quarters, educational, vocational and other rehabilititive [*sic*] programs, and priveleges [*sic*] . . . ." Leonard v. Mississippi State Probation & Parole Bd., No. GC 73-46-S, at 7 (N.D. Miss., Feb. 21, 1974). *See also* MISS. CODE ANN. § 47-5-103 (Supp. 1973).

[222]349 F. Supp. at 900-01.

[223]*Id.*

[224]Note, *The Problems of Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671, 685 (1967).

[225]*See, e.g.*, Edwards v. Sard, 250 F. Supp. 977 (D.D.C. 1966); Nichols v. McGee, 169 F. Supp. 721 (N.D. Cal.), *appeal dismissed*, 361 U.S. 6 (1959).

[226]*See, e.g.*, Toles v. Katzenbach, 385 F.2d 107 (9th Cir. 1967), *vacated*, 392 U.S. 1353 (1968). *Contra*, Montgomery v. Oakley Training School, 426 F.2d 269 (5th Cir. 1970); Crum v. State Training School for Girls, 413 F.2d 1348 (5th Cir. 1969).

to integrate prison facilities and programs . . ."[227] especially where the policy's sole aim is to perpetuate racial separation.[228] In 1966, in the landmark case of *Washington v. Lee*[229] which struck down racial segregation in an Alabama prison, the court stated:

> Since *Brown v. Board of Education,* 347 U.S. 483 (1954), and the numerous cases implementing that decision, it is unmistakably clear that racial discrimination by government authorities in the use of public facilities cannot be tolerated.[230]

Based on a similar theory, the proposal by the Center for Criminal Justice would allow racial separation only in "limited" instances where "continued association would immediately imperil institutional order or safety" and would be limited to the duration of the emergency.[231] Balanced against the interests of penal integration is the oft-noted fear of racial violence.[232] The burden of showing a likelihood of such violence is on the prison officials, and even where such likelihood is shown, the danger threatened must be of an extreme nature.[233]

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[227]MODEL RULES, *supra* note 206, at 44. The commentary to the proposal points out that the danger of conflagration is greatest in prison areas where interpersonal contact is greatest—living quarters and dining halls, for example. The proposal stresses equality in work assignments, housing, recreational and rehabilitative programs, and with respect to any classification decision made about inmates.

[228]Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

[229]263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968).

[230]*Id.* at 331.

[231]MODEL RULES, *supra* note 206, at 44.

Not all prisoners desire integrated facilities. Several prisoners, both black and white, sought to halt the integration order in Wilson v. Kelly, 294 F. Supp. 1005 (N.D. Ga.), *aff'd per curiam*, 393 U.S. 266 (1968), and substitute instead a "freedom of choice plan." The argument in support of this proposal was concern about prison violence. The court, in Rentfrow v. Carter, 296 F. Supp. 301, 303 (N.D. Ga. 1968), rejected this proposal. *See also* McClelland v. Sigler, 456 F.2d 1266 (8th Cir. 1972); Dixon v. Dixon, 218 F. Supp. 157 (E.D. Va. 1963).

[232]*See, e.g.,* Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd.*, 390 U.S. 333 (1968).

[233]*See* Cooper v. Aaron, 358 U.S. 1 (1958); Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961) (per curiam); James v. Duckworth, 170 F. Supp. 342, 350-51 (E.D. Va. 1959) ("[T]he preservation of the public peace cannot operate in such a manner as to cause constitutional rights to be sacrificed or yielded"). *Cf.* Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968), in which the court stated:

> In both the areas of racial classification and discrimination . . . we have pointed out that stringent standards are to be applied to governmental restrictions . . . and rigid scrutiny must be brought to bear on the justifications for encroachments on such rights. The [government] must strongly show some substantial and controlling interest which requires the subordination or limitation of these important constitutional rights, and which justifies their infringement . . . .

Whereas prisoners were once deprived of almost all their constitutional rights, the courts have moved decisively in the past decade to ameliorate this condition so that today substantial rights are retained by prisoners.[234]

> It is beyond dispute that certain rights and privileges of citizenship are withdrawn from prisoners, but it has never been held that upon entering a prison one is entirely bereft of all of his civil rights and forfeits every protection of the law.[235]

All of these rights are of the type which are of positive benefit to the prisoners, such as free exercise of religion[236] and right of access to the courts.[237] Why then did the courts see a need to integrate racially the prisons even in the face of potential violence, or has this merely been a constitutional reflex action with no thought as to effect?

The sociological ambit of *Brown v. Board of Education*[238] concludes that separation of the races has an inherently discriminatory effect.[239] An analogy may be drawn between schools and prisons in this regard since the desired result for both is to prepare a person to function well in society.[240] Because of the different disciplinary and psychological problems, however, as well as the obvious age differential, this analogy probably should not be extended too far. Rather, the simpler and more persuasive rationale for prison integration is that the treatment and facilities for black and white prisoners when separated have not been equal.[241]

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[234]*See generally* Owens v. Brierley, 452 F.2d 640 (3d Cir. 1971); Hollen, *Emerging Prisoners' Rights*, 33 OHIO ST. L.J. 1 (1972); Note, *The Problems of Modern Penology: Prison Life and Prisoners' Rights*, 53 IOWA L. REV. 671 (1967); Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963).

[235]Sewell v. Pegelow, 291 F.2d 196, 198 (4th Cir. 1961); *See* Siegal v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir.), *cert. denied*, 339 U.S. 990, *rehearing denied*, 340 U.S. 847 (1950).

[236]*E.g.*, Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967).

[237]*E.g.*, Cochran v. Kansas, 316 U.S. 255 (1942).

[238]347 U.S. 483 (1954).

[239]The conclusions of *Brown* have been strongly questioned based on data compiled by a Congressionally authorized study: COLEMAN, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966). *See* Bowles, *Towards Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 89 (1968).

[240]Although the problem of prison discipline does pose issues different from those raised in the school situation, *Brown v. Board of Education* indicates that discrimination on the basis of race is detrimental to the mental health and to the quality of education of Negro school children. These problems are relevant to a penal theory oriented towards rehabilitation of the convicted felon, who must be educated to accept his role in an integrated society. Note, *Beyond the Ken of the Courts, supra* note 234, at 686.

[241]*See* Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

The district court in *Gates* ordered the immediate end to all forms of racially discriminatory conduct by prison officials and a plan for desegregation of the living quarters.[242] As in other areas of the *Gates* decision, the court's reliance upon recalcitrant prison administrators to implement its order affords an opportunity for rather token and incomplete adoption of the *Gates* mandate. Approximately 1 year after the *Gates* decision and an entire 8 months after full integration was to have been achieved, the following housing units at Parchman remained segregated:[243]

| | (Number of Inmates) | |
|---|---|---|
| | Black | White |
| Camp B | 85 | 1 |
| Camp 5 | 1 | 66 |
| Camp 6 | 88 | 1 |
| Sunflower county "Road gang" | All black | |

The indifference of the prison administration to integrate fully Parchman 1 year after being ordered is a direct product of the court's reluctance to enforce to any extent its order.

It appears that *Gates* is the first successful attack on prison racial hiring practices.[244] Emphasizing the need to hire black prison personnel, the district court ordered that in hiring new employees to compensate for the elimination of trusty guards, the prison officials should make a "special appeal to the black community for qualified persons."[245] Progress of integrating the prison staff has been slow. As of October 1973—a full year after the *Gates* order—the black proportion of employees at

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[242]349 F. Supp. at 900-01.

[243]FEDERAL MONITOR REPORT, Sept. 7, 1973 & Oct. 4, 1973.

[244]In Sostre v. Rockefeller, 312 F. Supp. 863, 877 (S.D.N.Y. 1970), the district court held that a prisoner had standing to challenge racial discrimination in hiring of prison personnel but that statistics showing racial imbalance were insufficient to infer discrimination. Initially courts held that prisoners did not have standing to attack discrimination in employment of prison personnel. Wilson v. Kelley, 294 F. Supp. 1005 (N.D. Ga. 1968). *But see* the dissenting opinion, *id.* at 1013-15 (Shelton, J., dissenting), which relied upon school desegregation cases that included school personnel in desegregation orders. The rationale of the dissent was adopted in Montgomery v. Oakley Training School, 426 F.2d 269 (5th Cir. 1970), integrating the staff at a juvenile detention center.

[245]349 F. Supp. at 903.

[246]As of August 1973, the State Retirement System rolls listed 310 civilian employees at the penitentiary, of which 264 are white and 56 black. All 446 employees at Parchman between the periods of January 1, 1965 to May 21, 1971, including those who terminated their employment, were white.

Parchman rose from zero to 18 percent[246] in a prison system which is 63 percent black.[247]

With an increase of salary, improved working conditions, and more intensive recruiting, perhaps prison officials can increase the number of black employees and thus begin to fulfill the mandate of *Gates*. As with other dimensions of the order, however, absent more demanding requirements by the court to implement its judgment, full compliance as to prison racial hiring practices may not take place.

4. First Amendment — Censorship of Mail

Prisons thrive on sensory deprivation, on manufacturing a total environment. To the extent that mail communication will aid prisoners to reach the outer world with their grievances and allow them any communications material available, it will have succeeded in piercing the isolated world of the prison.[248] Letters to the courts, attorneys, public officials, the press, family and friends are often the only means for dispelling public ignorance about prison life. In light of the deplorable living conditions and exploitative philosophy that characterize Parchman, it is not surprising that the weapon of censorship has so systematically been applied. The delegation of authority to censor mail is filtered down from prison camp sergeants to their drivers,[249] wives, trusties, and other inmates.[250] The absence of any clearly stated policy or uniformly promulgated rules resulted in the *Gates* court finding that prisoners' first and sixth[251] amendment rights to be free from illegal censorship of mail had been violated.[252]

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[247]FEDERAL MONITOR REPORT, Sept. 2, 1973, at 6; Oct. 4, 1973, at 11-12. "On August 28, 1973, the total population of the penitentiary was 1,901, with 27 of this number housed at places other than the Parchman-Lambert complex. Of this total, 1,211, or 63 percent, were black, and 690, or 37 percent, were white." *Id.*

[248]Mail censorship in the area of prison litigation has traditionally been cast in a first amendment setting. In the future, however, those cases may be tried as fourth amendment violations based upon indiscriminate and unreasonable searches and seizures, *see, e.g.*, Palmigiano v. Travisono, 317 F. Supp. 776, 791-92 (D.R.I. 1970); or ninth amendment violations as an invasion of privacy, *cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972); Stanley v. Georgia, 394 U.S. 557 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965). For an excellent discussion of the ninth amendment theory in a prison context, see Singer, *Privacy, Autonomy and Dignity In the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process In Our Prisons*, 21 BUFFALO L. REV. 669 (1972).

[249]Gates v. Collier, No. GC 71-6-K, Deposition of Sgt. E.R. Moody, March 10-11, 1971.

[250]Gates v. Collier, 349 F. Supp. 881, 891 (N.D. Miss. 1972).

[251]*Id.* at 896. The sixth amendment violation was based upon censorship and interference with inmates' mail sent to their attorneys.

[252]The court in making its finding of such violation stated:

> [A]ny prison regulation or practice which restricts the [first amendment] right of free expression that a prisoner would have enjoyed if he had not been imprisoned must be related both reasonably, . . . and necessarily, . . . to the

The court then ordered the enactment of a fairly complex system of rules governing an inmate's right of correspondence. First, outgoing mail to a specified group of persons,[253] including court officials and the inmate's attorney of record, can not be interfered with in any manner.[254] Other outgoing mail can be opened and inspected to discover escape plans or other violations of "the laws of the State of Mississippi or of the United States,"[255] but only if there exist reasonable grounds to suspect such communications. All incoming mail from *any* source can be opened and inspected "in the presence of the inmate addressee, whenever the prison officials have reasonable grounds to suspect escape attempts or to discover drugs, weapons or other material expressly prohibited by state or federal laws or by *prison rules.*"[256] The court's regulations also allow "reasonable" limitations to be imposed as disciplinary measures on mail not in the protected category.

The weakness of the court's injunction regarding mail censorship lies in the decision to permit the same prison officials who had previously abused their censorship powers now to make the more sophisticated decision to censor mail communication when "reasonable grounds" exist. There is no assurance that the prison administration will not continue to abuse its responsibility as readily as in the past. The "reasonable grounds" requirement will become nothing but legal rhetoric—it creates the appearance and possibility of a right rather than protecting an actual substantive right.

The logical alternative, as suggested by at least one legal writer,

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advancement of some justifiable purpose of imprisonment. Carothers v. Follette, [314 F. Supp. 1014, 1024 (S.D.N.Y. 1970)].

*Id.* at 896 (citations omitted).

However, the propriety of a single federal district court judge to rule in matters of mail censorship within a state prison is in doubt in light of Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (en banc). *Sands* indicates that those issues must be tried before a three-judge panel pursuant to 28 U.S.C. § 2281 (1970).

[253]The complete list of specified groups of persons included:

(a) Officials of the federal, state and local courts;

(b) All federal officials including the President of the United States, any senator or congressman, and officials of any United States agency or department; all state officials including the Governor, members of the state Senate and House of Representatives and officials of any state agency or department;

(c) All members and employees of the State Probation and Parole Board;

(d) The attorney of record of an inmate in any pending action, civil or criminal, in any duly constituted local, state or federal court.

349. F. Supp. at 898.

[254]*Id.*

[255]*Id.* at 899. On April 26, 1974, in an oral order from the bench, Judge Keady granted defendants' request for supplemental relief and relaxed the previous order governing outgoing mail.

[256]*Id.* (emphasis added).

would be to require the prison officials to submit some proof of their "reasonable grounds" to a court and thereby obtain court permission before inspecting any correspondence.[257]

As noted in *Gates,* the main reasons given by prison officials for censorship or regulation of correspondence to and from inmates are "security, rehabilitation, or orderly prison administration . . . ."[258] "Security" is by far the strongest and least questioned argument presented by prison officials to support mail regulations. The distinctions between incoming and outgoing mail and to a lesser degree between general inmate correspondence and correspondence to and from inmates and courts or the prisoner's attorney are made for security reasons.

As to outgoing mail, judges, attorneys, and other public officials are not considered likely to participate in any escape plans proposed by the prisoner and are therefore a minimal security risk, not sufficient to justify the necessary impingement on constitutional protections which censorship or inspection would entail.[259] But why should the fact that the inmate's correspondent is not an attorney or judge automatically validate inspection of outgoing mail for escape plans, obscene language, or extortion plots? A less drastic alternative would be to punish those who would use the prison mail for illegal purposes in the same manner as those who use the "free world" mails for felonious purposes—through normal criminal prosecution under the postal regulations.[260]

There remains, however, the stricter scrutiny given incoming mail to prevent drugs, weapons, or other contraband from reaching the inmates. *Gates* allows incoming packages to be opened when "reasonable grounds" exist to suspect contraband. One method which has been suggested to screen for drugs, weapons, and other "bulk" items is to allow prison officials to flouroscope incoming mail.[261] This would give prison officials a reliable method of detecting contraband, while still protecting the inmates' right to receive unopened mail, except when contraband is found.

Is censorship needed at all? *Gates* would indicate that it is. However, several jurisdictions have totally abolished prison mail censorship[262] with no apparent harm to institutional operations.[263]

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[257]Singer, *Censorship of Prisoners' Mail and the Constitution*, 56 A.B.A.J. 1051, 1055 (1970).

[258]349 F. Supp. at 896.

[259]*See, e.g.*, Marsh v. Moore, 325 F. Supp. 392, 395 (D. Mass. 1971).

[260]MODEL RULES, *supra* note 206, Rule IC, n.5; Singer, *supra* note 257, at 1051, 1054.

[261]Marsh v. Moore, 325 F. Supp. 392, 395 (D. Mass. 1971).

[262]*See* Schwartz, *Prisoners' Rights: Some Hopes and Realities*, FINAL REPORT OF THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, A PROGRAM FOR PRISON REFORM 51 (1972).

[263]NATIONAL RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, ATTACKING

## III. Conclusion

### A. *The Failures of Gates v. Collier: Inmate Beatings of July 1973*

The history of the defense of the *Gates* case is one of condonation of lawlessness and general approval of contemptuous behavior. With the exception of a few rare moments of inspiration, the eyes of the defendants in *Gates* have never turned from cosmetic concerns to substantive action; the emphasis has been on "how do we make our present policies and practices appear to be in compliance with constitutional standards in order to remove the yoke of scrutiny by the federal court" rather than "how can we meet the immense task of toppling the age-old structure of historic prejudice and exploitation that perpetuates our prison system."[264]

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Prison Mail Regulations 13 (unpublished paper).

Even the Association of State Correctional Administrators recently endorsed in principle regulations which would virtually preclude all mail censorship, unless a clear and present danger to institutional security could be established. H. Clements, The Emerging Rights of the Confined 71 (S.C. Dep't of Corrections 1972). *See also* Model Rules, *supra* note 206, Rules IC-1 to -4.

[264]In a Memorandum Opinion, February 14, 1973, the court in *Gates* characterized the defense of the case:

> In the instant case, we have no difficulty in finding that defendants' actions were unreasonable and obdurately obstinate. From commencement of the suit on February 8, 1971 defendants staunchly denied the existence of unconstitutional practices and conditions at Parchman. Defendants continued to adhere to this position at several lengthy hearings of an interlocutory nature . . . . We are convinced that only because of the overwhelming magnitude of evidence gathered by plaintiffs' attorney . . . , did defendants in effect recognize the futility of a full evidentiary hearing and submit the case on a virtually agreed record.
>
> [*T*]*his suit was necessary only because of defendants' unreasonable refusal to comply with accepted constitutional principles.* We are further convinced that the unnecessary delay, extraordinary efforts, and burdensome expenses incurred incident to the resolution of this case were occasioned because of defendants' maintenance of their defense in an obdurately obstinate manner.

Gates v. Collier, No. GC 71-6-K, Memorandum Opinion, Feb. 14, 1973 (emphasis added).

About the character of the defense, the United States Court of Appeals for the Fifth Circuit had this to say:

> Defendants have appealed from the judgment (Appeal No. 73-1023 before this court). Having admitted to all the facts and conceding the constitutional violations, defendants have nevertheless appealed from the judgment on the ground that the complaint fails to state a recognized cause of action. Furthermore, defendants continually sought extensions and delays from compliance with the District Court's orders. Defendants' submission of plans required by the District Court's order have been found to be inadequate even after substantial delays and defendants continue to delay and obstruct any improvement in the conditions at Parchman.

Gates v. Collier, 489 F.2d 298, 300 (5th Cir. 1973).

Perhaps there is no better illustration of how defiant attitudes of prison officials coupled with the failure of the judiciary to insist upon compliance of its court mandates can make a mockery of the rule of law within a penitentiary than the beating incidents of July 1973. During that month, a group of Parchman security officers, styling themselves as a "roving security patrol," travelled from prison camp to prison camp assaulting and beating scores of prisoners.[265] The reason for the beatings, as told to the prisoners by members of the "security force," was that "Judge Keady has turned the prison back over to [the prison officials]."[266] Not incidentally, many of the prisoners who were beaten had actively participated in the prosecution of the *Gates* case, were plaintiffs in other prisoner rights lawsuits, or were "writ-writers."[267]

Procedures were initiated by plaintiffs in *Gates* to hold prison officials in violation of the *Gates* court order for the systematic acts of brutality,[268] and an expedited evidentiary hearing was set for July 23,

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[265]Gates v. Collier, No. GC 71-6-K, Oral Ruling of the Court, Jan. 14, 1974, at 11-14.

[266]Gates v. Collier, No. GC 71-6-K, Affidavit of Gerald T. Hansom, July 20, 1973; Affidavit of Marvin O. Harrington, July 20, 1973; Affidavit of Simmie Johnson, July 20, 1973; Ruling of the Court, January 14, 1974, at 13.

[267]For example, Walter Leonard, Jr., named plaintiff in Leonard v. Mississippi State Probation & Parole Bd., No. GC 73-46-S (N.D. Miss., February 21, 1974) was beaten after being verbally harassed for his participation in the suit and sustained 10 contusions on his back and trauma in both hands. Gates v. Collier, No. GC 71-6-K, Affidavit of Eighty Inmates from Camp 4, August 8, 1973, at 2.

[268]Probably the first word to leak out of the prison about the brutality was an extraordinary letter from 86 inmates of Camp Eleven to Judge Keady dated July 13, 1973, containing a lucid description of beatings at the camp and subsequent attempts by a now high-ranking penitentiary official to cover it up.

The 86 inmates who signed the letter stated the following:

Camp 11
Parchman, Ms.
July 13, 1973

Hon. Judge Wm. C. Keady
U.S. District Court
Federal Building
Greenville, Miss.

Dear Judge Keady:

In the past three days at least a dozen prisoners have been beaten by the penitentiary security force in bold violation of your orders. We believe and pray that this recrudescence of corporal punishment will merit your attention and that you will act to insure that the court's orders will not be flaunted and our lives further threatened.

Reports from the hospital indicate that abuses such as the three we describe below have taken place all over the farm. Inmates from First Offenders Camp, Camp 1, Camp 4, Camp 5, Camp 8 and Camp 11 have required medical treatment there as a result of beatings by security personnel this week.

1973, to view evidence of the beatings. Plaintiffs asked that the court order the guards involved discharged; that a federal master be ap-

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We write as victims of and/or eyewitnesses to the following: On Tuesday night, July 10, five prisoners were transferred from Camp 5 to Camp 11. Shortly after their arrival, security personnel took two of the five—William Bingham (MSP #36070) and Ronald McNelis (#36843)—out of the gunmen cage and assaulted them with their fists and nightsticks. (Camp 11's Sargeant, Gene Bell, was not on the Penitentiary grounds.)

Thursday night, July 12, at about 9:10 p.m., ten to twelve security force officers entered the Camp 11 hallway. Two or three approached the gunmen cage door and ordered everyone onto their bed. Their order was complied with; one officer then pointed to Mark Desmond Proietti (#36585), an inmate on his bed nearest the cage door. He was ordered to take off the short pants he was wearing; he responded, "Alright", and did as he was told, putting on a pair of long ones. He was then ordered out of the cage and into the hall where, without either provocation or explanation of any sort, he was attacked by five or six of the security officers wielding all manner of weapons: slap jacks, night sticks, a 12 to 15″ bar and shotguns. Proietti was knocked to the floor by a combination of blows to his head from these weapons.

Once on the floor, he was repeatedly kicked about his head and back; he was asked if he knew how to say, "Yes sir". He answered, "Yes sir", and the beating continued for another minute or so.

It ended only when the camp sergeant, Gene Bell, arrived and intervened: He bodily pushed two of the assaulting officers from Proietti. As the others backed away, he ordered all the security personnel outside (telling them that he might lose his job but that he wouldn't allow the beating as long as he was in charge of the camp).

He then took Polaroid pictures of Proietti's wounds, which included multiple lacerations and abrasions about his back, arms and head. One of two head wounds required stitches at the MSP hospital. He was taken there by Sgt. Bell and treated by Dr. Sam—. The doctor also treated one of the security officers for broken foot bones sustained in kicking Proietti.

There are rumors extent that as many as twenty inmates were beaten at Camp 4 on Wednesday night. We'd rather not speculate as to what might have happened here had not Sgt. Bell arrived when he did.

The following MSP security personnel were among those involved during the events of July 12 described above: MSP Sergeants Childs (Camp 1), Slaughter (C-2), Burchfield (C-4), L.A. Johnson (C-8) and High (MSU); security officers Lt. Steed, Steve Johns, Slate, Ronnie Hudson, and Emmett Adams.

Finally, you should be aware of the (rumored) threats against the lives of any inmate who speaks of MSP Security's nightriding.

Respectfully,
Inmates of Camp 11

Note: This is our second attempt to complete this petition. The first four typed copies (in somewhat better form) were confiscated in a shakedown Saturday night by Lt. Mooney of MSP Security.
cc: L.C.C.R.U.L., 213 N. Farish St., Jackson, Ms. News Media

[Signatures of 82 inmates]
Gates v. Collier, No. GC 71-6-K, Letter from Inmates of Camp 11, July 13, 1973.

pointed to administer the prison;[269] that federal marshalls be employed to protect prisoners; and that the court fine the defendants a nominal sum to be paid to the injured inmates.[270] Plaintiffs offered into evidence affidavits from over 200 prisoners, a state senator, the prison physician, a penitentiary board member, and six free-world guards, all in a thoroughly documentary form, to prove the plaintiffs allegations of widespread "goon squad" beatings and recrimination. The defendants' initial reactions varied; defenses included: the charges were "exaggerated;"[271] the injuries "could have been self-inflicted;"[272] or there was "no evidence;"[273] and simply that there had been no brutality.[274] The defendants also alleged that the injuries to inmates resulted from their attempts to escape or from their attempts to assault prison guards and that the allegations were part of a "conspiracy" to discredit state officials. The conspirators were identified as a camp sergeant, three night-watchmen, a penitentiary board member, a state senator, and others, all of whom had been plaintiffs' witnesses earlier in the week.[275]

After reviewing the evidence, the court took the matter of the alleged brutality under advisement but entered an interlocutory decree, ordering that the state hire a qualified penologist as soon as possible[276] and appointing the federal monitor to inspect the prison periodically for problems of compliance with the court order and report his findings to the court.[277] In November, the United States Department of Justice, as plaintiff-intervenor, requested that the court reopen the record for the taking of additional evidence. The request was granted and on January 14, 1974, the court heard additional evidence.[278] Private plaintiffs reiterated their previous requests for relief. The United States reaffirmed its position that unwarranted and widespread brutality had occurred and urged the court to take action to preclude repetitions of the beatings.[279]

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[269]FED. R. CIV. P. 53.

[270]Gates v. Collier, No. GC 71-6-K, Application for Order to Show Cause, July 19, 1973, at 10-11.

[271]Statement by Charles Riddell, Chairman of the Penitentiary Board. Delta Democrat Times, July 23, 1973, at 26, col. 2.

[272]Statement by Corbet Patridge, Chairman of the state Senate Correction Committee. *Id.*

[273]Statement by Danny Thomas, Chief Security Officer at Parchman. Delta Democrat Times, July 26, 1973, at 31, col. 3.

[274]Statement by Charles Riddell. *Id.* July 24, 1973, at 28, col. 1.

[275]Testimony of Charles Riddell, Chairman of the Penitentiary Board, and two prison inmates in Gates v. Collier, No. GC 71-6-K, Contempt Hearings, July 23-27, 1973.

[276]*Id.* Supplemental Order, Aug. 22, 1973.

[277]*Id.* Order, Aug. 22, 1973; Supplemental Order, Aug. 28, 1973; and Amended Order, Sept. 7, 1973. See note 158 *supra*.

[278]Gates v. Collier, No. GC 71-6-K, Order, Dec. 7, 1973.

[279]*Id.* Argument of Counsel (transcript), Jan. 14, 1974, at 3.

Counsel for the United States argued:

> [W]e have a fact situation before this Court that raises a textbook example of the interplay of civil contempt in the sense of violation of an outstanding order and that type of contemptuous behavior in the presence of the Court that otherwise permits summary power of the Court to be imposed. Because if these incidents occurred—and the United States contends that they did—then affidavits have been filed in this Court that are false, affidavits filed clearly with the intent to obstruct justice and perjury was committed in this courtroom today, also with the intent to obstruct justice.[280]

The United States then asked the court to invoke its contempt powers and jail three particularly offending prison security officers[281] to induce their cooperation in naming "higher-ups" involved.

Ruling orally, the court couched its evidentiary findings on the theory that prisoners, who may have been in violation of the prison rules concerning personal grooming of the hair and beard, refused to comply with orders of the "roving security patrol" to correct immediately the violations, and there ensued violence in which "there were instances of excessive force upon inmates . . . [s]ome guards were guilty of brutal acts when they thus undertook to inflict summary punishment upon an inmate for being out of compliance with the haircut regulation."[282] Further, the court held that, "[the] incidents were, in large part, the result of administrative ineptitude, a lack of direction, coordination and instructions to the roving security force as to their purposes and functions."[283]

In spite of its findings that prison guards had beaten inmates, the court declined to hold the defendants in contempt of court,[284] stating as

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[280] *Id.* at 4.

[281] Plaintiffs contended that these three officers alone were responsible for over 50 beatings during the week of July 8-14, 1973. *Id.* at 6.

[282] *Id.* Ruling of the Court, Jan. 14, 1973, at 13. Nowhere in its opinion did the court recognize other possible motivational factors behind the beatings namely, racial antagonisms, recrimination for writing writs or other legal actions despite the fact that the affidavits and testimony of both plaintiffs' and defendants' witnesses pointed to these factors.

[283] *Id.*

[284] Use of the contempt power has been utilized by courts where plaintiffs have been denied the protection and fruits of their judgment. *See* McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949); Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911); Lance v. Plummer, 353 F.2d 585 (5th Cir. 1965), *cert. denied*, 384 U.S. 929 (1966). *See also* FED. R. CIV. P. 70, which provides in part, "[I]f a judgment directs a party . . . to perform any . . . specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court . . . . The court may also in proper cases adjudge the party in contempt."

its reasons, the lack of repetitions of violence, the successful efforts of the defendants in securing a qualified penologist to head the prison, and the inequity of jailing the guards, since they are simply there to carry out orders from above.[285]

### B. *Gates v. Collier: A Catalyst and Invitation to Legislative Action*

Inmates at Parchman turned to the federal courts in order that their constitutional rights be recognized, respected, and enforced at the penitentiary. Prisoners presented their claims to the judiciary in the forum of *Gates v. Collier*; this was necessary because Mississippi's legislature and executives have consistently ignored unconstitutional conditions and practices at Parchman. The *Gates* litigation also attempted to focus public attention on the inadequacies of the state penitentiary and to set in motion a train of legislative and administrative action to alter substantially the very character of the prison system. Litigation alone will not change the course of inert and indifferent institutions. The behavior of such institutions will change, if at all, only in response to strong and coordinated pressures.

In attempting to build a constitutional prison system for the State of Mississippi, the district court in *Gates* realized that the legislature and executive office would, for the first time in Parchman's history, have to play a major role in allocating resources and adopting programs to insure minimum constitutional standards at the prison. Courts have often issued orders "suggesting" expenditures and a reorganization of government functions where necessary to protect fundamental rights.[286] In following these judicial precedents, the district court in *Gates* has faced the dangerous prospect of confrontation with the legislature in requiring financing and reorganization of the prison. As of this date, the court has minimized the chance of conflict by framing *Gates* in a rather cautious tone, seeking cooperation with the legislature. Five major areas were outlined for legislative study and consideration in the court's order of October 20, 1972:

(1) reduction of the inmate population at the Parchman com-

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[285]Gates v. Collier, No. GC 71-6-K, Ruling of the Court, Jan. 14, 1974, at 16.

[286]*See, e.g.*, Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972) (order to reallocate funds so as to provide decent jail conditions); Taylor v. Sterrett, 344 F. Supp. 411 (N.D. Tex. 1972) (mandating new prison facilities, programs, and procedures, despite the cost); Wyatt v. Stickney, 344 F. Supp. 387, 344 F. Supp. 373 (M.D. Ala. 1972), *orders enforcing* 325 F. Supp. 751 (M.D. Ala. 1971), *appeal docketed sub nom.* Wyatt v. Adirholt, No. 72-2637 (5th Cir., filed May 1, 1972) (financing and reorganization of Alabama's state mental institutions); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (requiring reorganization of staff, alteration of physical plant, and introduction of some form of rehabilitation program).

plex by alternatives, such as halfway houses, work release programs, and alternative facilities located elsewhere for non-violent inmates and first offenders;

(2) programs for "maximum utilization of the penitentiary's assets";

(3) construction of new housing units and renovation of old physical structures deemed salvable;

(4) construction of desperately needed sanitation facilities;

(5) long overdue improvements in medical and health care.[287]

This article has documented the legislature's neglect in ensuring the safety and improving conditions of prisoners at Parchman. The legislature did illustrate a willingness and ability to effect some meaningful correctional change in the form of its intense concern and reaction to the incidents surrounding the death of Parchman inmate Danny Calhoun Bennett in 1971.[288] Two significant laws were enacted that year in response to comprehensive reports submitted to the 1971 legislature: a vague order directing the Mississippi Penitentiary Board to begin "limited centralization" of facilities at Parchman;[289] and the elimination of inmate trusties by July 1, 1974.[290]

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[287]349 F. Supp. at 903-04.

[288]General Legislative Investigating Committee, Mississippi State Penitentiary 50 (1971).

The committee introduces its report on Danny Bennett's murder with two key general comments on Parchman penitentiary:

> Cruel and inhuman treatment of inmates by sadistic guards and trusties is a fact well documented in our files. Beatings are inflicted regularly and deaths occur from a variety of unnatural causes, most of which receive little or no attention from the outside world.
>
> The evils and atrocities made possible by the trusty system, which are so well depicted in this report, will continue in full force and effect until the system is changed.

*Id.*

The committee concluded: "That a double standard of justice applies to crimes committed within the confines of the penitentiary and do not receive the same attention by the authorities as do similar crimes committed outside the penitentiary." *Id.* at 62.

In a minority report filed by Senator Theodore Smith, the Senator carried these conclusions further:

> The sadistic beatings and other inhumane treatment meted out to inmates at Parchman is a disgrace to humanity. It is unbelievable that such could happen in a civilized country . . . . Parchman is not rehabilitating prisoners. It is making hardened criminals out of the inmates.

*Id.* at 83.

[289]Miss. Code Ann. § 47-5-5 (1972), ordered the penitentiary board to centralize the services, facilities, and security operations at Parchman, and to phase out the existing agricultural camps coincident with the elimination of the trusty guard system. This was to be done "as soon as practical."

[290]Miss. Code Ann. § 47-5-143 (1972), ordered the elimination of the trusty guard

With the initiation of the *Gates* lawsuit on February 8, 1971 more legislative action began to focus on the penitentiary. Two laws were passed in 1972.[291] The first major legislative steps were taken after the *Gates* order of October 1972 was rendered. Major areas of redress by the 1973 legislature included a detailed plan for the beginning of renovation and construction needed to "facelift" the prison,[292] the creation of a classification committee,[293] and the initiation of the state's first work-release[294] and drug rehabilitation programs.[295]

In the expert testimony of the district court's federal monitor virtually every area affected by the spate of 1973 acts is sharply criticized,[296] indicating that these legislative programs are already falling far short of their goals and what is necessary at Parchman.

Bills introduced in the 1974 legislative session again failed to meet needs in important areas, particularly in providing new rehabilitative services.[297]

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system by July 1, 1974. Prior to that date, the superintendent may still use inmates in custodial capacities. The board may eliminate the trusty system at a faster pace if in keeping with intent of section 47-5-5.

See, however, the comments on the trusty system in GENERAL LEGISLATIVE INVESTIGATIVE COMMITTEE, MISSISSIPPI STATE PENITENITARY 50 (1971), to verify the weakness inherent in the protracted deadline allowed for elimination of the trusty system.

[291]MISS. CODE ANN. § 47-5-3 (1972), cites, for the first time, a statement of purposes for the penitentiary as: "the custody, punishment, confinement at hard labor, and reformation" of felons at the location of the Parchman farm.

MISS. CODE ANN. § 47-5-151 (1972) makes it mandatory that an autopsy be performed and a written report filed whenever a prisoner is found dead on the Mississippi State Penitentiary grounds. The law also makes it the state's duty to investigate the circumstances of the death if any questions are raised as to cause of death in the coroner's report on the incident.

[292]MISS. CODE ANN. § 47-5-5 (Supp. 1973), is a detailed proposal outlining the building and equipping of new physical structures, as well as renovations of existing facilities, at the Mississippi State Penitentiary.

[293]See note 183 *supra*.

[294]MISS. CODE ANN. § 47-5-159 to -169 (Supp. 1973).

[295]MISS. CODE ANN. § 47-5-136 (Supp. 1973).

[296]*See* FEDERAL MONITOR REPORT, Sept. 2, 1973; Oct. 4, 1973; Oct. 30, 1973; and Dec. 15, 1973. "From an operational point of view, the proposed plan has many weaknesses and I question whether the state of Mississippi can afford the operational costs." FEDERAL MONITOR REPORT, Oct. 4, 1973, at 21. "I recommend the present plans be reconsidered. In my opinion, a total master plan should be developed, including professional review, before construction starts." *Id.* at 22.

[297]It is interesting to note two bills introduced in the 1974 legislative session which died in committee: (1) S.B. No. 1603, Mississippi Legislature 1974, would have established a separately located first offenders' camp, with a separate superintendent for the camp; and (2) S.B. No. 1678, Mississippi Legislature 1974, was meant to authorize the penitentiary

In the unending struggle between security and treatment in Mississippi, the former has remained dominant.[298] Also, the profit motive condemned by the court in *Gates* is still evident. Lawlessness and human degradation are not adventitious byproducts of past and present practices at Parchman. Rather, they are the result of the State of Mississippi's long-standing policy of operating a prison on a profit which foments inequity and exploitation. Additionally, ubiquitous racism with its many complex origins is a major contributing factor in the State's emasculation of inmates.

Powerful forces must be utilized in order that a prison operating under constitutional standards be *built* in Mississippi. The delicate chemistry of these forces includes the federal judiciary, the state legislature and Governor, the United States Government, and strong public demand, all of which must work in concert.

Based upon Mississippi's experience in other areas of recognizing existing human rights (*e.g.*, Mississippi's struggle with school desegregation), one is justified in believing that the battle to enforce the Constitution within the state prisons will face resistance and opposition. In the final analysis, if minimum rights are not recognized and enforced at Parchman, we all will suffer. For the prison indeed oppresses not just those who are locked within its cages. It reaches out to every one of us.

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board to establish regional correctional facilities and separate maximum, medium and minimum security units. See Gates v. Collier, 349 F. Supp. 881, 903 (N.D. Miss. 1971).

[298]Although the 1973 legislature appropriated $875,000 for construction of a new maximum security unit, it has not yet given sufficient attention to the need to improve the vocational training and work opportunities offered Parchman prisoners.

MISS. CODE ANN. § 47-5-167 (Supp. 1973), authorized the penitentiary board to cooperate with private industry to develop work-release programs and particularly to begin providing skilled vocational training, but the federal monitor noted in his report of Oct. 4, 1973: "There has been no significant change in utilization of the penitentiary's assets since the order was issued. Officials comment casually about establishing industries but I discern no planning or even study of this matter." FEDERAL MONITOR REPORT, Oct. 4, 1973, at 19.

In painful contrast, the monitor refers throughout this final report to the limited and minimally diversified offerings in training and skills, *id.* Dec. 15, 1973, while stressing the special need to make such programs available to men in the Maximum Security Unit:

> Men in close confinement continue to have basic and derived human needs and the state must provide means for satisfying these needs . . . . Since these inmates are considered dangerous or potentially destructive, it is especially important that they be involved in intensive, resocialization treatment.

*Id.* at 4.

> *Also, industries should be established to employ those who must remain in a security environment.* Unquestionably there is sufficient state market to support industries employing 500 inmates. *However, the establishment of industries will meet with strong opposition and it will take a firm resolve and full legislative and administrative support* to accomplish this objective.

*Id.* at 16 (emphasis added).

## PRISON ABOLITION OR DESTRUCTION IS A MUST!

*The following letter was written by a prisoner at Parchman Penitentiary in Sunflower County, Mississippi. As an expression of opinion by one most affected by efforts at reform and revitalization of America's prisons, the letter is offered as a balance against idealism and optimism about the future of penal institutions.*

There is no such thing as Prison Reform, at least in its literal sense. At the most, we will receive superficial treatment to a fundamental problem that needs a very fundamental solution. The original conception of imprisonment was probably truly intended to reform "corrupted" individuals. After 200 years of this system, however, we can see that it has utterly failed in this respect and has surfaced to take on a new form.

True enough, throughout history it has been a recognized right of all societies to punish crime, but the prison system is a scheme America created as the key modern technique for correction. This American conception of rehabilitating an "anti social" person is to isolate him from normal life. The true form has now been made manifest. Prisons are simply a painful punitive process; a most severe form of corporal punishment that the administrators have capitalized on for their own selfish reasons.

I, Louis X (Holloway) #35073, a Black Prisoner of Parchman plantation-prison in Sunflower County, Mississippi, charge the Administration of America with being exploiters and perpetrators of the crime of *genocide*! Crime is the biggest business in America. The police officers, the jailers, the courts of lawyers and judges, the prison administrators and prison guards (who sell contraband, positions, allow gambling, prostitution) all base their very survival on the perpetuation of crime! At Parchman plantation-prison, it has long been the established custom to operate at a profit regardless of the cost. Therefore we prisoners are not paid wages for our labor, forced to live at the merest subsistence level, and denied the chance to direct our energies in any area that the state cannot profit from.

The administrators are charged with committing *genocide*. Black People are victimized into prisons (for political, religious or social reasons) in numbers that are alarmingly unparalleled to their ratio in population. Mississippi Blacks make up 40 percent of the population in the state, 70 percent of the prison population, and the ratio is 10 to 1 in the special units used for intense torture. *Genocide* is the deliberate and systematic destruction of a racial, political, or cultural group. *Genocide* is the mistreatment of such groups by organized groups, usually

Governments. *Genocide* means any of the following acts committed with the intent to destroy a people in whole or in part, such as (1) killing members of the group; (2) causing serious bodily or mental harm to members of the group; (3) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; or (4) imposing measures intended to prevent births within the group. All of these measures fit the Black Man's condition here on Parchman plantation-prison.

Thus you have "White Time" and "Black Time." The white prisoner has never been denied equal opportunities in America. The white prisoner is given equal justice under the law, and except for a few rare cases chooses to commit a crime. The Black Prisoner has never been a free moral agent in this case. His very efforts to get food, decent housing, his so-called inalienable rights, are a crime! Therefore any institution designed to isolate these men will not solve the problem. There exists no adequate definition as to what makes a criminal. Violations of the law are done sometimes out of mental illness, out of necessity of survival, spontaneous anger, lust, ignorance, or by accident. One thing is for sure: there is never a "born criminal"! There is no category as to what precisely makes one violate a law, therefore, reform efforts toward prisoners will fail *for the very same reason violators are made outside the prison*; *i.e.*, this wicked system's teachings, attitudes, and actions work against creating healthy minds.

Even if all forms of racism and inhumanity could be eliminated from the prison systems, the problems would only be half solved. It is against the very nature of Man to be confined from normal activities, grouped together with other men, and denied the association of women. Such a system will *always* breed hatred, animosity, resentment, frustration, inferiority complexes, homosexuality, and general inhumanity to man. Where these energies will be directed is another issue, but they will be present; the prison will always be a powder keg.

Even if prisons could be cleaned up and improved, this would still not compensate for the injustice done to the victims, nor would this guarantee that there would be no future victims. What about the women and children who are rape victims? What about families who have a loved one seriously injured or maybe murdered? Or what about the substantial property damage done because of burglaries, etc.? Who pays for the injuries, the loss of time from work, and the mental damage done to the victims and their families? The prison systems are paid for by these victims who pay the enforced taxes. Black people are forced to pay taxes in order that *genocide* may be perpetuated. How then can the prison system take remedial and provisional measures when its very existence stands self-evident that the problems still exist?

Let's face the facts. There is no definite way society can go about

ensuring that better individuals are administrators of prisons, instead of the current exploiters. We are being shown everyday that there is no equal justice under the law. People who rise to certain influential positions have been found to be exempt from being equally treated by the law, and this power tends to corrupt. The only true, conscientious prison administrator is one whose ultimate goal would be the abolishment of prisons, because he would know that so long as a man removes another from society, or a society-like atmosphere, he is guilty of going against nature itself.

Parchman is a plantation first, and a prison second. It has always been like this even when it was first established at the state capitol in Jackson, Mississippi. Frantic, desperate, enormous efforts are being made to take the steps that will implement the drastic changes necessary to make Parchman a prison with prisoners, as it's supposed to be, instead of a plantation with slaves.

Even this effort is being beset with all types of unbelievable, paradoxical forms of opposition. From massive political intervention, to personal individual intimidation, there are forces presently in effect to prevent Parchman from being made into a prison. If the state does not recognize us as prisoners with certain prisoners' rights, how then could an individual or group of individuals be found that could establish a prison reform program—let alone be effective? Right this minute we prisoners are being used as political pawns, for the selfish gains of a few individuals. There are those capitalizing off the fact that Parchman is unconstitutional, that we are working under harsh conditions, forced to live under deplorable conditions, subjected to numerous forms of terror tactics, etc. And there are those who are capitalizing from the gradual transition that is taking place, and the individual prisoner is no better off mentally, physically, or spiritually than he was last year. With all of the diverse individuals involved, with all of the various organizations involved, the crucial issues are given only token representation.

In order for prison reform to work, all the elements that perpetuate crime must be reformed too! Where then, can you find such administrators who would go all out against these perpetuators? What man or men can be found who would work for, and at the same time against, the entire Government? To eliminate the *genocidal* practices in such places would first necessitate exposure.

*Genocide* is an international crime punishable by international law. Exposure then, could possibly destroy the American Government. Obviously I'm dealing with the extreme viewpoints, but numerous others who have dealt with half measures—ignoring one point for another, have accomplished nothing. I'm serving a 20-year sentence for armed robbery. I was convicted solely on the prosecuting attorney's ability to convince the jury I was guilty without offering any substantial evidence.

It was never an issue whether I was guilty or not, but, rather, what legal points could be gotten away with. The question of what remedial action should be taken in behalf of the alleged victim was never discussed. Neither was the point brought out as to what problems I might've had, and whether provisional measures could be taken. No! The state saw a chance to profit, and the prosecuting attorney was satisfying an ego which got satisfaction out of making a jury believe what he wanted them to. No, the extreme viewpoint must be considered and dealt with. It is on these bases that I stand firmly convinced. Five years of my life have been spent experiencing every aspect of incarceration. I've studied the various situations and programs in other states, and I still irrevocably state that prison abolishment or destruction is a *must*!

The time has come to forget about reforming the prison system and to begin thinking about replacing it. I'm looking at it from both viewpoints, and any other decision will only involve a lot of rhetoric and needless lives, time, and money spent. You really have an either-or proposition. Either abolish the prison system or it will be destroyed! At least through abolition the administrators can still retain an element of control over the situation. If not, then the prison powder keg will blow.

It can be done. It has been done. There was a period in history when no prisons existed. The laws of nature may be ignored or denied, but they cannot be suppressed. Until there is Freedom, Justice and Equality for all men in the lands of America—that is—full and complete freedom, equal justice under the law, and equal opportunities for all, destruction is the only possible end. Which incidentally makes prison reform a *joke*.

In the Spirit of the New World,
LOUIS X (HOLLOWAY)
35073
Camp Two
Parchman, Mississippi
38738

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# COMMENTS

## STOP AND FRISK IN MISSISSIPPI: IS IT LEGAL? SHOULD IT BE? A COMMENT ON *KEYS v. STATE*

Six years ago the United States Supreme Court, yielding to the "powerful hydraulic pressures . . . that [bore] heavily on [it] to water down constitutional guarantees . . .,"[1] held, in *Terry v. Ohio,*[2] that police may, without violating the fourth amendment,[3] "stop[4] and frisk"[5] suspected criminals without a warrant and upon less than probable cause to make a full search or arrest. Last fall the Mississippi Supreme Court, in *Keys v. State,*[6] held, in spite of *Terry,* that police officers in

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[1]Terry v. Ohio, 392 U.S. 1, 39 (1968) (Douglas, J., dissenting). Some of the pressure came in the form of scholarly commentary. See LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond,* 67 MICH. L. REV. 39, 40-41 n.4 (1968), and Raphael, *"Stop and Frisk" in a Nutshell: Some Last Editorial Thrusts and Parries Before It All Becomes History,* 20 ALA. L. REV. 294, 295 n.7 (1968), for numerous citations to such material.

[2]392 U.S. 1 (1968).

[3]The fourth amendment provides:

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,* and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV (emphasis added). It is the "reasonableness" clause, italicized above, which is relevant here.

[4]A "stop" is a "seizure" within the meaning of the fourth amendment. It is, however, less intrusive than an arrest. *See* text accompanying note 40 *infra.* The term has been defined by one authority as follows:

> A "stop" is a temporary detention of a person for investigation. A stop occurs when an officer uses his authority either to compel a person to halt, to remain in a certain place, or to perform some act. . . . If a person is under a *reasonable* impression that he is not free to leave the officer's presence, a "stop" has occurred.

PROJECT ON LAW ENFORCEMENT POLICY & RULEMAKING, ARIZONA STATE UNIVERSITY, MODEL RULES FOR LAW ENFORCEMENT: STOP AND FRISK 3 (1973) (footnotes omitted) [hereinafter cited as MODEL RULES].

[5]A "frisk" is a "search" within the meaning of the fourth amendment, but is less intrusive than a "full search," such as is conducted incident to an arrest. *See* note 40 and accompanying text *infra.* A frisk is a limited patdown or an external feeling of clothing for concealed weapons or dangerous instruments. MODEL RULES, *supra* note 4, at 12-13; Raphael, *supra* note 1, at 304. The procedure described by the Court in *Terry,* 392 U.S. at 17 n.13, *quoting* Priar & Martin, *Searching & Disarming Criminals,* 45 J. CRIM. L.C. & P.S. 481 (1954), refers, not to a frisk, but to the search conducted "after *arrest* and before the arrested person is taken to the station." LaFave, *supra* note 1, at 91 & n.260.

[6]283 So. 2d 919 (Miss. 1973).

Mississippi do not have the power "to search a person unless [that person] is under arrest by authority of a warrant or for probable cause."[7] Since the search in *Keys,* as in *Terry,* was a "patdown" or "frisk" rather than a "full search," our court appears to have held that *any* search, no matter how limited in scope and no matter what description given it, is illegal in Mississippi unless it is conducted pursuant to either a warrant or probable cause.[8]

It is the purpose of this comment to carefully examine the *Keys* opinion, and then determine whether it is consistent with precedent, and whether it is an expression of desirable social policy, that is, whether it is responsive to present social realities in Mississippi.

## I. The Factual Context of the *Keys* Decision

The *Keys* facts are: on October 14, 1971,[9] Officer Wayne Howard of the Pascagoula Police Department, who had been employed by the Department's Narcotics Division for 13 years,[10] sent an informant, whom Officer Howard knew and "[h]ad . . . used" before,[11] to the

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[7]*Id.* at 921.

[8]The exact holding of *Keys* is as follows:

> In the instant case, the arresting officers contended that "patting down" the defendant was not a search of his person. Their theory seems to be that they merely "frisked him", and they seem to believe that they had the right to do so without arresting him. *We trust we will be understood when we say to "pat down" is to search a person, and an officer has no authority to search a person unless that person is under arrest by authority of a warrant or for probable cause.*

283 So. 2d 919, 921 (Miss. 1973) (citing Terry v. Ohio, 392 U.S. 1 (1968) as direct authority for this statement) (emphasis added).

[9]Record at 34-35, Keys v. State, 283 So. 2d 919 (Miss. 1973). The first two sentences of the statement of facts contained herein, which deal with events before issuance of the search warrant, vary somewhat from the facts as set out in the court's opinion. This writer's statement conforms to the "Affidavit for Search Warrant" and the "Search Warrant" itself, Record at 34-35, while the court's statement on this point (283 So. 2d at 920, third paragraph, first sentence of the opinion), which indicates that a *telephone call* from the informant was the basis for the warrant, is taken verbatim from the Brief for Appellant, at 2, and appears to be based on Officer Howard's interrupted testimony that "[o]n October 15th of '71, I had received prior information from the informant, in getting a search warrant—." Record at 7. Howard actually received two calls from the informant on October 15, one indicating that a raid of Keys' residence at 7 p.m. would not yield anything, Record at 8, and one at 10 p.m., disclosing that contraband was contained in the apartment at that time, Record at 10. (The Brief for Appellee does not discuss what happened before the search warrant was issued.) Other than this minor incongruity which could not have had any effect on the result, the facts stated herein are in conformity with the opinion. The Record is cited hereafter only when the fact noted is not contained in the opinion.

[10]Record at 7.

[11]*Id.* at 19.

apartment of Robert Keys, Jr., to purchase marijuana.[12] The informant made the purchase from Keys, and returned to Officer Howard with the contraband. At about 5 p.m. the next day,[13] Officer Howard secured a search warrant for Keys' apartment, but did not ask for an arrest warrant.[14] Later that evening, he and a partner drove to Keys' apartment.[15] As they approached, they saw Keys and two passengers drive off. The officers followed for about a mile, and then stopped Keys' car in order to serve the warrant. After both cars stopped, the policemen approached Keys' car, and asked Keys to "step from [his] vehicle, which he did."[16] Howard then frisked Keys and found three matchboxes containing marijuana. After the frisk, three more matchboxes were seen in "plain view."[17] Keys was then arrested for possession of the marijuana and taken to the police station where he was formally charged and served with the warrant.

On these facts, Keys was convicted and sentenced for possession of marijuana. On appeal, the Mississippi Supreme Court viewed the authority to frisk as emanating directly and exclusively from the authority to arrest. Consequently, the court held that since the officers did not have the authority to arrest Keys, the "search . . . was clearly . . . illegal . . . ,"[18] and therefore the fruits of the illegal search should have been excluded.[19] In reversing the conviction, the court stated that Keys'

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[12]*Id.* at 34-35.

[13]*Id.* at 11.

[14]*Id.* at 20. Howard explained that he did not ask for an arrest warrant because "[i]t has never been the policy to do this . . . ." *Id.* at 68.

[15]*Id.* at 9-10.

[16]*Id.* at 20.

[17]Two matchboxes were in the car, and one was on the ground. *Id.* at 16-17. Since the second set of matchboxes was found *after* the illegal frisk, they were properly excluded as "fruits of the poisonous tree." *See* Wong Sun v. United States, 371 U.S. 471, 488 (1963). However, had all police conduct been proper, these three matchboxes could possibly have been admissible under the "plain view" doctrine, which holds that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." Harris v. United States, 390 U.S. 234, 236 (1968).

[18]283 So. 2d 919, 921 (Miss. 1973).

[19]The exclusion of the marijuana was commanded by the "exclusionary rule," which is a judicially-created doctrine designed to put teeth in constitutional guarantees against illegal seizure of evidence. It was adopted by the Mississippi Supreme Court in 1922, in Tucker v. State, 128 Miss. 211, 90 So. 845 (1922), 39 years before it was applied to all the states by the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643 (1961). The rule exists for two reasons: (1) to deter unlawful official conduct, and (2) to insure the integrity of the judiciary. *See, e.g.*, Mapp v. Ohio, *supra.* The rule is often criticized. *E.g.*, Bivens v. Six Unknown Agents, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting) ("mechanically inflexible response"); People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (Cardozo, J.) ("[t]he criminal is to go free because the constable has blundered"); Oaks, *Studying the Exclusionary Rule in Search & Seizure,* 37 U. Chi. L. Rev. 665 (1970)

motion for a directed verdict should have been granted, "since the only testimony offered was illegally obtained."[20]

The court's discussion of the facts and the law applicable to the encounter between Keys and the officers is brief,[21] thus rendering it difficult to predict how the court will view stop and frisk fact situations in the future. The opinion appears to hold that *all* frisks violate the law; nevertheless, the possibility always remains that the court will later limit the application of the *Keys* holding to the *Keys* facts.[22] This comment will take the position that the *Keys* holding is commendable and that no retreat from it is called for.

## II. Is *Keys* Consistent With Precedent?

### A. *The United States Supreme Court*

The *Terry* decision represented the first time[23] the Supreme Court sanctioned police stop and frisk procedures. On its own facts, *Terry* does not ignore or do violence to the Constitution; however, as will later be made clear, its carefully limited holding has been extended by many courts to allow searches and seizures which are clearly unreasonable. In

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(rule does not in fact deter illegal police conduct). *See also* Wright, *Must the Criminal Go Free if the Constable Blunders?*, 50 TEXAS L. REV. 736 (1972) (apply rule only where police conduct has been flagrantly illegal). And it is often defended. *E.g.*, Mapp v. Ohio, *supra*; Elkins v. United States, 364 U.S. 206 (1960); Wolf v. Colorado, 338 U.S. 25, 41 (1949) (Murphy, J., dissenting) (argues that rule should be applied to states); Weeks v. United States, 232 U.S. 383 (1914) (applying rule to federal prosecution). *See generally* Terry v. Ohio, 392 U.S. 1, 12-15 (1968) (rule is needed but cannot be applied where State does not prosecute).

[20]Keys v. State, 283 So. 2d 919, 921-22 (Miss. 1973).

[21]The discussion took up only 2 pages of the 8-page opinion. The court used the remainder of the opinion to discuss and overrule the "doctrine of curative admissibility," which held that a defendant who objected to the State's introduction of illegally-seized evidence had waived the objection when he later took the stand and admitted that he possessed the material in question. The doctrine had long been recognized in Mississippi, but had been invalidated as violative of due process by several decisions of the United States Supreme Court. *See, e.g.*, Harrison v. United States, 392 U.S. 219, 223-24 (1968), *quoted in* Keys v. State, 283 So. 2d 919, 926 (Miss. 1973):

> The question is not *whether* the petitioner made a knowing decision to testify, but *why*. If he did so in order to overcome the impact of [evidence] illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the [evidence itself] inadmissible.

[22]*See, e.g.*, LaFave, *supra* note 1, at 111 n.371, discussing how Escobedo v. Illinois, 378 U.S. 478 (1964), was modified by Miranda v. Arizona, 384 U.S. 436 (1966).

[23]Adams v. Williams, 407 U.S. 143, 153 (1972) (Marshall, J., dissenting); Terry v. Ohio, 392 U.S. 1, 9-10 (1968); United States v. Greene, 429 F.2d 193, 197 n.7 (D.C. Cir. 1970). One commentator has asserted that police had stop and frisk authority at common law. Cook, *The Art of Frisking*, 40 FORDHAM L. REV. 789, 790 & n.7 (1972); Cook, *Varieties of Detention and the Fourth Amendment*, 23 ALA. L. REV. 287, 295 (1971).

*Terry*, Detective Martin McFadden, who had been a policeman for 39 years, was patrolling on foot in downtown Cleveland one afternoon in 1963 when he observed Terry and a companion standing on the corner of Huron Road and Euclid Avenue. The two men " 'didn't look right to' [the officer],"[24] so he began watching them. One of them walked up Huron, looked into a store window, walked further up the street, returned to the same store window, and then rejoined his companion to confer briefly. The companion then followed the same procedure, and between them the two suspects "repeated this ritual"[25] about a dozen times. During this "performance,"[26] a third man joined them for a brief conversation, and then departed up Euclid Avenue. After he left, the other two "resumed their measured pacing, peering and conferring"[27] for 10 minutes, and then walked up Euclid and met the third man. Officer McFadden, thinking that the three men were " 'casing a job, a stick-up,' "[28] and might be armed, approached them, announced that he was a policeman, and asked their names. When they merely " 'mumbled something' "[29] in answer, McFadden immediately patted down the outside of Terry's clothing and felt a gun, which he seized. Terry was convicted of possession of a concealed weapon,[30] and his conviction was twice affirmed by Ohio state courts.[31]

The United States Supreme Court, in an opinion written by then Chief Justice Warren, also affirmed.[32] The Court stated the issue narrowly: "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest."[33] The opinion then avoided deciding the constitutionality of an investigative stop upon less than probable cause. This question was avoided because the majority felt that it could not tell from the record whether McFadden had, "by means of physical force or show of authority, . . . restrained [Terry's] liberty" before the frisk, that is, whether a "seizure," within the meaning of the fourth amend-

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[24]Terry v. Ohio, 392 U.S. 1, 5 (1968).

[25]LaFave, *supra* note 1, at 47, *quoting* Terry v. Ohio, 392 U.S. 1, 6 (1968).

[26]LaFave, *supra* note 1, at 47.

[27]Terry v. Ohio, 392 U.S. 1, 6 (1968).

[28]*Id.*

[29]*Id.* at 7.

[30]Possession of a concealed weapon was a violation of Section 2923.01 of the Ohio Code. Ohio Rev. Code § 2923.01 (1953).

[31]State v. Terry, 5 Ohio App. 2d 122, 214 N.E.2d 114 (1966). The Ohio Supreme Court dismissed the appeal for lack of a "substantial constitutional question." *See* Terry v. Ohio, 392 U.S. 1, 8 (1968).

[32]Terry v. Ohio, 392 U.S. 1, 8 (1968).

[33]*Id.* at 15.

[34]*See* Yam Sang Kwai v. Immigration & Naturalization Service, 411 F.2d 683, 693 n.10 (D.C. Cir. 1969) (Wright, J., dissenting), *cert. denied*, 396 U.S. 877 (1969); LaFave, *supra*

ment, had occurred.[35]

The holding in *Terry* was also limited:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.[36]

While some theoreticians have maintained that such a carefully limited holding is "the essence of good appellate judging in *uncharted* territory,"[37] this holding probably failed to answer as many questions as it raised,[38] and left lower courts without much guidance in "this important new field of law."[39] The *Terry* Court did make four points clear: (1) the reasonableness clause of the fourth amendment governs stop and frisk procedure as well as more intrusive searches and seizures;[40] (2) officers must still obtain warrants "whenever practicable," but in stop and frisk situations the warrant procedure is *not* practicable;[41] (3) officers cannot frisk a citizen unless they reasonably fear that he is armed *and* presently dangerous to the officers or to others;[42] and (4) because

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note 1, at 63, 64; *cf.* Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

None of the other three opinions handed down with *Terry* decides the question either. The issue was squarely presented in Wainwright v. New Orleans, 392 U.S. 598 (1968), but the writ of certiorari was dismissed as improvidently granted. In Sibron v. New York, 392 U.S. 40 (1968), a frisk which yielded heroin was declared invalid because the officer had no reasonable fear that Sibron was armed. And in Peters v. New York, 392 U.S. 40 (1968), the Court found that Peters had been arrested upon probable cause.

[35]Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

[36]*Id.* at 30.

[37]LaFave, *supra* note 1, at 46 n.28, *quoting* K. LLEWELLYN, THE COMMON LAW TRADITION, DECIDING APPEALS 389 (1960).

[38]LaFave, *supra* note 1, at 46.

[39]Terry v. Ohio, 392 U.S. 1, 31 (1968) (Harlan, J., concurring).

[40]*Id.* at 16-19 & n.15.

[41]*Id.* at 20; *accord,* United States v. United States District Court, 407 U.S. 297, 318 (1972). This preference for warrants is not always applied by courts. LaFave, *Warrantless Searches & the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9, 27 (1972). Nor is it often taken seriously by police. "[I]n the city of San Francisco there were only 19 search warrants issued in 1966 and only 20 in 1967." Dorman v. United States, 435 F.2d 385, 400 n.3 (D.C. Cir. 1970) (Wright, J., concurring & dissenting).

[42]Terry v. Ohio, 392 U.S. 1, 24, 27, 30 (1968).

"[t]he scope of [any] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"[43] the scope of a permissible frisk for weapons must not go beyond a patdown of a suspect's outer clothing.[44] Furthermore, the Court stated no less than five guidelines for lower courts and police officers to use in deciding the legality of official conduct, each of which has been treated as "the *Terry* test" by some lower court.[45] The Court, however, left four other highly important questions unanswered: (1) When can a police officer make a *forcible* stop of a citizen?[46] (2) When, if at all, does an informant's tip justify a stop and frisk?[47] (3) How long can a permissible stop last?[48] (4) When, after a proper forcible stop has been made, is a citizen required to answer a police officer's questions?[49]

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[43]*Id.* at 19, *quoting* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

[44]392 U.S. at 26, 29, 30.

[45](1) "In determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." Terry v. Ohio, 392 U.S. 1, 19-20 (1968), *cited as controlling in, e.g.*, Carpenter v. Sigler, 419 F.2d 169 (8th Cir. 1969).

(2) "[T]here is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.' Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)." Terry v. Ohio, *supra* at 21, *cited as controlling in, e.g.*, United States v. Davis, 459 F.2d 458, 459 n.3 (9th Cir. 1972).

(3) "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the] intrusion." Terry v. Ohio, *supra* at 21, *cited as controlling in, e.g.*, Gomez v. Wilson, 323 F. Supp. 87, 92 (D.D.C. 1971), *remanded*, 477 F.2d 411 (D.C. Cir. 1973).

(4) "[I]t is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" Terry v. Ohio, *supra* at 21-22, *cited as controlling in, e.g.*, United States v. Hostetter, 295 F. Supp. 1312, 1315 (D. Del. 1969).

(5) "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio, *supra* at 22, *cited as controlling in, e.g.*, Adams v. Williams, 407 U.S. 143, 145 (1972).

[46]See note 34 *supra*.

[47]This question was partially answered by Adams v. Williams, 407 U.S. 143 (1972). See notes 58 & 59 and accompanying text *infra*.

[48]LaFave, *supra* note 1, at 98; see notes 88-92 and accompanying text *infra*.

[49]This question has apparently never been authoritatively answered. If no forcible stop has been made, it is clear that: "[W]hile the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." Davis v. Mississippi, 394 U.S. 721, 727 n.6 (1969). *See also* Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring). At least one court appears to believe that

In *Adams v. Williams*,[50] the only case since *Terry* and its companions in which the Court has dealt directly with stop and frisk, Justice Rehnquist, writing for the Court, provided partial answers to the first two of the above questions. Officer John Connolly, while on duty about 2 a.m. in a high crime area of Bridgeport, Connecticut, was told by an informant that Williams, who was sitting alone on the passenger side of a car parked nearby with the motor turned off, had narcotics on his person and a gun in his waistband. The officer walked up to the car and asked Williams to open the door. When Williams rolled down his window instead, Connolly immediately reached for Williams, found a gun in his waistband, and removed it. Following Williams' arrest for possession of a concealed weapon, an extensive search uncovered heroin in his coat and in his automobile.[51] Williams was convicted for possession of both the gun and the drugs, and his conviction was affirmed by the Connecticut Supreme Court,[52] but the United States Court of Appeals for the Second Circuit found the stop and frisk for the gun, Williams' arrest, and the subsequent search for heroin illegal, and granted Williams' petition for a writ of habeas corpus.[53]

The Supreme Court reversed, finding that Officer Connolly's actions "conformed to the standards this Court laid down in Terry."[54] Connolly's request that Williams open his door was a forcible stop, but was "reasonable," since (quoting vague *dictum* in *Terry*) "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest."[55] The

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the answer to the question posed is "never." Loyd v. Douglas, 313 F. Supp. 1364, 1372 (S.D. Iowa 1970). Nevertheless many citizens do feel compelled to answer. "[O]f 300 field interrogations observed in Chicago, in not one instance did the suspect refuse to answer questions." LaFave, *supra* note 1, at 93 n.275, *citing* Pilcher, *The Law & Practice in Field Interrogation*, 58 J. CRIM. L.C. & P.S. 465, 488 (1967); *accord*, Miranda v. Arizona, 384 U.S. 436, 468 n.37 (1966).

[50]407 U.S. 143 (1972). Though some judges have insisted that *Adams* did not extend *Terry*, but only decided the relationship between an informant's tip and a stop and frisk, *e.g.*, Gomez v. Wilson, 477 F.2d 411, 424 n.10 (D.C. Cir. 1973) (Bazelon, C.J., concurring & dissenting); Long v. District of Columbia, 469 F.2d 927, 935 (D.C. Cir. 1972) (Wright, J., concurring), most courts have disagreed, *e.g.*, United States v. Riggs, 347 F. Supp. 1098, 1103 (E.D.N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir. 1973).

[51]407 U.S. at 145.

[52]State v. Williams, 157 Conn. 114, 249 A.2d 245 (1968), *cert. denied*, 395 U.S. 927 (1969).

[53]Williams v. Adams, 441 F.2d 394 (2d Cir. 1971) (*en banc*), *reversing* 436 F.2d 30 (2d Cir. 1970). Habeas corpus actions brought by state prisoners are governed by 28 U.S.C. §§ 2241-54 (1970).

[54]Adams v. Williams, 407 U.S. 143, 144 (1972).

[55]*Id.* at 145, *quoting* Terry v. Ohio, 392 U.S. 1, 22 (1968).

officer's opening of the car door and reaching to Williams' waistband for the gun was also "reasonable," according to the majority, because "Sgt. Connolly had ample reason to fear for his safety."[56] After the gun was found, Williams was arrested for its possession upon probable cause, even though possession of a concealed weapon is legal in Connecticut where the possessor has a permit.[57] The subsequent search for and seizure of the heroin was also held proper. Most importantly, the Court held that Officer Connolly's initial actions—the stop and frisk—were justified by the informant's tip, notwithstanding the fact that the tip would not have furnished probable cause for arrest or search. "[T]he information carried enough indicia of reliability to justify the officer's forcible stop of Williams,"[58] and subsequent events justified Officer Connolly's actions pursuant to the tip.

*Adams* did little to clarify the objective standards to be applied by lower courts in stop and frisk cases. It told us that *this* tip justified *this* stop and frisk, but also said that "[s]ome tips, completely lacking in indicia of reliability,"[59] would not suffice. What does "enough indicia of reliability" mean? We are not told; we can only infer that it means more than nothing and less than is required for probable cause. The importance of *Adams*, however, does not lie in the doctrine it espouses. The *Adams* decision, along with several other Burger Court opinions in the area of criminal procedure, exemplifies the willingness of the present majority to do what it can to uphold convictions, even where previously-recognized constitutional rights must be abridged to do so,[60] and even

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[56]407 U.S. at 147-48.

[57]*Id.* at 159 (Marshall, J., dissenting).

[58]*Id.* at 147.

[59]*Id.*

[60]*Compare, e.g.*, United States v. Robinson, 94 S. Ct. 467 (1973), *and* Gustafson v. Florida, 94 S. Ct. 488 (1973), *with* Chimel v. California, 395 U.S. 752 (1969), *and* Terry v. Ohio, 392 U.S. 1 (1968) (search incident to arrest). *Compare* United States v. Ash, 413 U.S. 300 (1973), *and* Kirby v. Illinois, 406 U.S. 682 (1972), *with* United States v. Wade, 388 U.S. 218 (1967), *and* Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at line-ups and picture showings). *Compare* Tollett v. Henderson, 411 U.S. 258 (1973), *with* Patton v. Mississippi, 332 U.S. 463 (1947) (racial composition of jury). *Compare* Johnson v. Louisiana, 406 U.S. 356 (1972), *and* Apodaca v. Oregon, 406 U.S. 404 (1972) *with* Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial). *Compare* United States v. Harris, 403 U.S. 573 (1971), *with* Spinelli v. United States, 393 U.S. 410 (1969) (warrant based on tip). *Compare* Harris v. New York, 401 U.S. 222 (1971), *with* Miranda v. Arizona, 384 U.S. 436 (1966) (*cf.* Tucker v. Johnson, 352 F. Supp. 266 (E.D. Mich. 1972), *aff'd mem.*, 480 F.2d 927 (6th Cir. 1973), *cert. granted sub nom*, 94 S. Ct. 568 (1973)). *Compare* United States v. White, 401 U.S. 745 (1971), *with* Berger v. New York, 388 U.S. 41 (1967) (wiretaps).

From a reading of the foregoing opinions, it would appear that Chief Judge Friendly's hope that "[i]f the course of decision is to be altered by the newly constituted Court, . . . the changes should be clearly articulated and rationally explicated," has not been

where precedent must be ignored.[61]

### B. *Lower Courts*[62]

Lower courts have struggled to apply the few "stop and frisk" principles laid down by the Supreme Court to the numerous fact situations which have come before them.[63] Some cases have dealt with stops only,[64] some with stops and frisks,[65] and some with only frisks.[66] The most difficulty has been encountered in deciding whether forcible stops were justified in particular situations. The fact that the most difficulty has been encountered at this point stands to reason, since the Supreme Court has carefully avoided enumerating precise standards to be used in making the determination. Some courts, in order to uphold forcible stops, have used such observations as: "[T]here is nothing ipso facto unconstitutional in the brief detention of citizens in circumstances not justifying an arrest, for purposes of limited investigation in the course of routine police investigations."[67] Most courts, however, have required some kind of "reasonable suspicion"[68] — not just an "inarticulable

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fulfilled. Friendly, *Mr. Justice Harlan, As Seen by a Friend and Judge of an Inferior Court*, 85 HARV. L. REV. 382, 388 (1971).

[61]For example, *Terry* required that an officer have a reasonable belief that a suspect was armed *and* dangerous before a frisk could be conducted; the *Adams* majority "virtually ignores" the "and dangerous" part of the requirement. Adams v. Williams, 407 U.S. 143, 159 (1972) (Marshall, J., dissenting).

[62]This comment places heavy reliance on decisions of lower federal courts. This does not mean that state courts do not confront these issues; rather, federal cases are cited because more readers will have access to the federal reporters than to those of states outside this region.

[63]As one judge has put it:

> The resolution of search and seizure questions by lower courts (and by law enforcement officials) has been fraught with difficulty because precedents from the High Court are, with deference, often difficult to reconcile. Over the 183 years since the adoption of the Bill of Rights, the Court's decisions have, in the words of one of the Justices, been "unexplained and inexplicable."

United States v. Ragsdale, 470 F.2d 24, 27 (5th Cir. 1972) (Clark, J.), *quoting* Coolidge v. New Hampshire, 403 U.S. 443, 521 (1971) (White, J., concurring & dissenting).

[64]*E.g.*, United States v. Catalano, 450 F.2d 985 (7th Cir. 1971), *cert. denied sub nom.* Moscatello v. United States, 405 U.S. 928 (1972); United States v. Gazaway, 297 F. Supp. 67 (N.D. Ga. 1969).

[65]*E.g.*, United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972); Dykes v. Camp, 333 F. Supp. 923 (D. Mo. 1971).

[66]*E.g.*, United States v. Miller, 468 F.2d 1041 (4th Cir. 1972), *cert. denied*, 410 U.S. 935 (1973). *Terry* is often used as a justification for airport searches. *E.g.*, United States v. Moreno, 475 F.2d 44 (5th Cir. 1973).

[67]United States v. Fisch, 474 F.2d 1071, 1076 (9th Cir.), *cert. denied*, 412 U.S. 921 (1973), *quoting* Wilson v. Porter, 361 F.2d 412, 415 (9th Cir. 1966).

[68]*E.g.*, United States v. Davis, 459 F.2d 458 (9th Cir. 1972).

hunch"[69] — "that criminal activity may be afoot."[70]

Although courts have generally paid at least lip service to the "reasonable fear" prerequisite to a frisk,[71] and to the requirement that even a permissible frisk be limited in scope to a patdown of a suspect's outer clothing for weapons,[72] many courts have picked up the signals recently sent out from Washington and upheld police action which was arguably unnecessary or more intrusive than warranted by the facts.[73] One way this has been done is to use *Terry*, much as the "harmless error" rule[74] is often employed, to affirm convictions where appellate courts are not sure whether error was committed below.[75] For example, if a court has trouble deciding whether the prosecution is correct in asserting that officers had probable cause to arrest or search before they conducted a stop or frisk, the court may avoid the problem by holding that even if probable cause was not present, *Terry* justified the police action.[76]

### C. *The Mississippi Supreme Court*

The Mississippi Supreme Court has been called upon to consider *Terry* and its progeny in only one case other than *Keys: Dotson v. State.*[77] In *Dotson,* as Highway Patrolman David Huggins drove up to the Tunica Post Office about midnight, January 14, 1971, he observed

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[69]*E.g.*, United States v. Day, 455 F.2d 454 (3d Cir. 1972).

[70]Terry v. Ohio, 392 U.S. 1, 30 (1968). Chief Judge Brown has said that such a suspicion exists when "a prudent officer could reasonably conclude that something was rotten in Denmark." United States v. Colbert, 474 F.2d 174, 179 (5th Cir. 1973) (concurring opinion).

[71]*E.g.*, Stotts v. Perini, 427 F.2d 1296 (6th Cir. 1970).

[72]*E.g.*, Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969).

[73]See Orricer v. Erickson, 471 F.2d 1204, 1208 (8th Cir. 1973) (concurring opinion), in which, after the majority affirmed a denial of habeas corpus relief, Judge Webster concurred on the ground that, even if the majority were in error, the Supreme Court would not reverse.

[74]The "harmless error" rule is codified at FED. R. CRIM. P. 52, and at MISS. SUP. CT. R. 11.

[75]*See, e.g.*, Prestage v. State, 257 So. 2d 882 (Miss. 1972); Collins v. State, 202 So. 2d 644 (Miss. 1967).

[76]*See, e.g.*, United States v. Edwards, 469 F.2d 1362 (5th Cir. 1972) (stop and frisk); Dodd v. Beto, 435 F.2d 868 (5th Cir. 1970), *cert. denied,* 404 U.S. 845 (1971) (stop); Ballou v. Massachusetts, 403 F.2d 982 (1st Cir. 1968), *cert. denied,* 394 U.S. 909 (1969) (frisk).

[77]260 So. 2d 839 (Miss. 1972). The relationship between the Mississippi case of *Smith v. State,* 240 Miss. 738, 128 So. 2d 857 (1961), and the more recent group of stop and frisk cases is not settled. If "an arrest begins when an officer begins his pursuit for the purpose of making an arrest," and the officer must have probable cause at that instant for the arrest to be valid, *id.* at 743, 128 So. 2d at 859, what happens if an officer, without probable cause, pursues a person to make a forcible stop short of an arrest? If an officer cannot legally do this, it is obvious that such a rule is more "honoured in the breach than the observance." "Hamlet," Act 1, Scene 4.

Mr. Dotson " 'coming out of the post office walking in a rather sideways manner, appearing to . . . be hiding something, and . . . [with] something in his hands.' "[78] Huggins "asked" Dotson to "hold up a minute";[79] but Dotson kept walking. At this point Huggins stopped his car beside Dotson, jumped out, and ordered Dotson to halt and to hold up whatever he had in his hands. Dotson complied, and Huggins identified the objects in Dotson's hands as a large bolt and screwdriver. Dotson was arrested, tried, convicted and sentenced for possession of burglary tools.[80]

On appeal, Dotson's conviction was affirmed. The court held that "[a]lthough the facts [varied] substantially, . . . [the] case [fell] squarely within the rationale . . . of *Terry* . . . ."[81] In order to determine whether Huggins' actions were "reasonable," the court felt called upon, pursuant to *Terry*, to balance the need to stop Dotson with the intrusion which it entailed. To do this, the court used one of Terry's many tests: it determined, first, "whether the officer's action was justified at its inception, and [second], whether it was reasonably related in scope to the circumstances which justified the interference in the first place."[82]

Since Huggins "had reasonable grounds to suspect" that criminal activity was afoot, his order to Dotson to stop and hold up his hands was "justified," thus satisfying the first prong of the test. The second requirement was easily met since all Huggins did after his initial intrusion was to order Dotson to drop the tools. Because the contraband was in Huggins' plain view[83] after Dotson was ordered to stop, the court expressly disregarded the "frisk" aspect of *Terry*.

### *D. Keys Compared With Precedent*

Assuming that *Keys* was properly characterized as a stop and frisk case,[84] four questions must be asked to determine whether the *Keys*

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[78]260 So. 2d 839, 840 (Miss. 1972). Huggins had been a highway patrolman for less than 2 years when Dotson was arrested. Record at 10, *id.* at 839.

[79]260 So. 2d at 839.

[80]Possession of burglary tools is made a crime by MISS. CODE ANN. § 97-17-35 (1972).

[81]260 So. 2d at 840.

[82]*Id.* at 841, *quoting* Terry v. Ohio, 392 U.S. 1, 19-20 (1968).

[83]See note 17 *supra*.

[84]Since the officers had enough information to secure a warrant to search Keys' residence, it is *possible* that they also had probable cause to arrest him, and thus to conduct a thorough search incident to the arrest, such search having been granted legality in United States v. Robinson, 94 S. Ct. 467 (1973). However, if the officers had information sufficient to constitute probable cause, they certainly did not communicate this to the court. *See* Record, Keys v. State, 283 So. 2d 919 (Miss. 1973). *See also* LaFave, *supra* note 1, at 72 n.165.

opinion is consistent with precedent: (1) Were the officers justified in stopping Keys' car? (2) If they were, was the detention brief enough? (3) Was the frisk justified? (4) If so, was it properly limited in scope?

The validity of the initial stop was not discussed in the opinion, although it could have rested on one or both of two theories. The first theory is that Keys was not stopped for the purpose of arresting him, but rather so that he could be served with the warrant for the search of his apartment. Since officers have the authority to stop vehicles to check for driver's licenses and vehicle registration papers,[85] surely a stop to serve judicial process is permissible. However, the warrant was not served until after Keys was arrested and in custody, which leaves Officer Howard's assertion that the stop was made to serve the warrant open to considerable doubt. The second available theory, though, would more probably support the legality of the stop. Since the officers had information that Keys had marijuana in his apartment, they may have had enough cause to "reasonabl[y] suspect"[86] that he also had contraband in his car or on his person, thus justifying their detention of him for "routine investigation."[87]

As to the permissible time limit for such a detention: "[t]he case law is virtually unanimous in requiring that stops be 'brief' . . . . The case law is also virtually unanimous in refraining from saying what 'brief' means."[88] The proposed Model Rules suggest that a stop upon "reasonable suspicion" not last longer than necessary to "determine if the person should be arrested or released," and in any case not longer than 20 minutes.[89] Since only 3 minutes elapsed between Keys' stop and his arrival at the police station, it would appear that the duration of the stop was clearly reasonable. However, since "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,"[90] Keys could be stopped only long enough to carry out the legitimate objective of the stop[91] — either long enough to serve the warrant, or long enough to determine if an arrest

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[85]Morgan v. Town of Heidelberg, 246 Miss. 481, 150 So. 2d 512 (1963). *See also* Patenotte v. United States, 266 F.2d 647 (5th Cir. 1959).

[86]See note 68 and accompanying text *supra*.

[87]See note 67 and accompanying text *supra*. But if they did, they did not so testify. See note 84 *supra*.

[88]Model Rules, *supra* note 4, at 42.

[89]*Id.* at 9.

[90]Terry v. Ohio, 392 U.S. 1, 19 (1968), *quoting* Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring).

[91]In United States v. Luckett, 484 F.2d 89 (9th Cir. 1973), Luckett's motion to suppress counterfeit money orders was sustained because he was detained *after* a citation was issued to him for jaywalking, even though the police had no reasonable suspicion of other criminal activity.

was called for. Using this logic, the stop was too long if its purpose was to serve the warrant, but was not too long if its purpose was to see whether an arrest was called for.[92]

The record provides no basis for a holding that the frisk was lawful. Officer Howard testified that he frisked Keys for weapons because he was "in fear for his safety,"[93] but he furnished no reason *why* he was "in fear"; Officer Howard only said that such frisks were "always done."[94] Bare assertions are not sufficient under *Terry*; enough specific and articulable facts must be shown to persuade a neutral and detached observer that the action taken was appropriate.[95]

Furthermore, even if the frisk was legal at its inception, it is difficult to see how it did not exceed its permissible scope. When Officer Howard testified that "I patted him down, I did not search him,"[96] presumably he meant that he merely patted the outside of Keys' clothing for weapons, and in the course of the patdown felt three hard objects in Keys' pockets. Presumably Howard then reached into Keys' pockets and seized the three hard objects, examined them, saw that they were matchboxes, and then opened each of them, revealing what appeared to be marijuana. Unless Howard could convince the court that he had a reasonable belief that the hard objects he felt were weapons, Howard could not legally reach into Keys' pockets.[97]

To summarize, it cannot be gleaned from the record whether the stop was "justified at its inception," or whether it lasted too long, but it can be concluded that the *frisk* was illegal both at its inception and in its scope. Thus the result in *Keys* is consistent with precedent, regardless of whether this comment correctly construes the opinion as invalidating stop and frisk in Mississippi, or whether the court subsequently reveals that it meant to hold that *this* frisk *only* was illegal.

## III. Is *Keys* an Expression of Desirable Social Policy?

There is another possible reason, other than that expressly given by the court, for the holding in *Keys*: the court may have felt that it would be unwise and unnecessary to grant stop and frisk powers to police officers in Mississippi.

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[92]Ordering Keys out of his car did not render the stop an arrest. United States v. Harflinger, 436 F.2d 928, 933 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971).

[93]Record at 39.

[94]*Id.*

[95]Terry v. Ohio, 392 U.S. 1, 27 (1968); Stotts v. Perini, 427 F.2d 1296 (6th Cir. 1970).

[96]Record at 15.

[97]*See, e.g.*, United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972); Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969). *See also* Cook, *The Art of Frisking*, *supra* note 23, at 796 & nn.42-44 (1972).

The Supreme Courts of both the United States and Mississippi have historically agreed with the words of Justice Jackson:

> [Fourth amendment rights] belong in the catalog of indispensable freedoms. Among deprivations of right, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[98]

In keeping with this viewpoint, the *Terry* majority "begrudgingly"[99] recognized that police officers in high crime areas of major cities needed stop and frisk power in order to protect themselves and the public. All of the Supreme Court cases, and most of those in lower courts, in which stop and frisk procedure has been upheld,[100] have in fact come from large metropolitan areas,[101] where violent crimes are committed at an alarming pace.[102] In those areas, stop and frisk practices may well be necessary, and thus judicial condonation of them may have to be justified at this time.

Mississippi, however, has but two metropolitan areas,[103] neither of which is anywhere near as large as Cleveland, Ohio—where Officer McFadden met Terry and his compatriots—or Bridgeport, Connecticut—where Officer Connolly felt called upon to seize a weapon and some heroin from Williams.[104] Furthermore, we are blessed with a low crime

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[98]Brinegar v. United States, 338 U.S. 160, 180 (1949) (dissenting opinion written soon after return from Nuremberg trials), *quoted in* Almeida-Sanchez v. United States, 413 U.S. 266, 274 (1973); *cf.* Terry v. Ohio, 392 U.S. 1, 9 (1968), *quoting* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

[99]Adams v. Williams, 407 U.S. 143, 154 (1972) (Marshall, J., dissenting).

[100]The two Supreme Court cases are Adams v. Williams, 407 U.S. 143 (1972), and Terry v. Ohio, 392 U.S. 1 (1968). Some lower court cases are; *e.g.*, United States v. Moreno, 475 F.2d 44 (5th Cir. 1973) and United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971) (airport stop and frisk).

[101]For example, the metropolitan area of Cleveland, Ohio—where *Terry* took place—has a population of 2,064,000, and the Bridgeport, Connecticut, metropolitan area — where *Adams* occurred — has a population of 794,000. Bureau of the Census, Social & Economic Statistics Administration, U.S. Dep't. of Commerce, Statistical Abstract of the United States 1972, at 838-39.

[102]For example, there were 750 murders and 7100 assaults in Detroit, Michigan in 1973. Anderson, *It's a Mystery Why Detroit Tops U.S. in Homicides,* Detroit Free Press, Jan. 6, 1974, § A, at 3, cols. 7-8, & at 9, cols. 1-8. *See also* Federal Bureau of Investigation, Uniform Crime Reports for the United States 1972, at 120 (1973) [hereinafter cited as Uniform Crime Reports].

[103]In 1970 the Jackson area had a population of 258,897, and the Biloxi-Gulfport area had a population of 134,582. Division of Business & Industry, College of Business & Industry, Mississippi State University, Mississippi Statistical Abstract 1973 at 79.

[104]See note 101, *supra*.

rate.[105] Though the *rate* of violent crime is not low,[106] the *number* of murders[107] and other assaults[108] is, and murders of [109] and attacks on[110] officers of the law are relatively rare. Thus, our court may have concluded that it was not compelled by necessity to place its "constitutional imprimatur"[111] upon official activity which "represents the last step before crossing into the territory marked 'unlawful [searches and] seizures.' "[112]

At least five additional policy arguments support this conclusion. First, the grant of stop and frisk power in *Terry* is alleged to be necessary because no other weapon exists to check the "American criminal's . . . long tradition of armed violence."[113] Congress appears to be incapable of passing meaningful gun control legislation,[114] and even if it did,[115] there is considerable doubt that such legislation could be enforced well enough to significantly curtail the commission of crimes of violence.[116] The *Terry* Court recognized this,[117] and went on to attempt to fashion a carefully limited constitutional remedy. However, the fact remains that *Terry did* limit the protections previously provided by the fourth amendment, and in doing so allowed Congress and the American citizenry to avoid confronting the need to find less intrusive, more clearly constitutional means of checking violent crime. *Terry* was an unsuccessful attempt at a stop-gap solution; it has not caused the incidence of violent crime to go down,[118] which was the only objective it set out to

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[105]Mississippi's crime rate—1,320.1 per 100,000 inhabitants—was the fourth lowest in the country in 1972. UNIFORM CRIME REPORTS 68-77.

[106]Mississippi's rate of violent crime was 312.7 per 100,000 inhabitants (29th lowest) in 1972. *Id.*

[107]Three hundred and forty-eight murders and nonnegligent manslaughters were committed in Mississippi in 1972, *id.* at 72, as compared to 750 in the *city* of Detroit alone in 1973. See note 102, *supra.*

[108]In Mississippi, in 1972, 7,076 violent crimes were committed. UNIFORM CRIME REPORTS 72.

[109]In the East South Central area, which includes Mississippi, 12 law enforcement officers were killed by felonies *or accidents* in 1972. *Id.* at 167.

[110]Nine hundred and eight officers were assaulted in 1972 in the East South Central area, the lowest number in any of the nine regions. *Id.*

[111]Terry v. Ohio, 392 U.S. 1, 13 (1968).

[112]Loyd v. Douglas, 313 F. Supp. 1364, 1372 (S.D. Iowa 1970) (describing police "stop and question" procedure).

[113]Terry v. Ohio, 392 U.S. 1, 23 (1968).

[114]See R. SHERRILL, THE SATURDAY NIGHT SPECIAL (1973); *cf.* United States v. Cecil, 457 F.2d 1178, 1181 (8th Cir. 1972) (Heaney, J., dissenting).

[115]The latest bill introduced is S. 981, 93d Cong., 1st Sess. (1973); *see* discussion at CONG. REC. § 3124-27 (daily ed. Feb. 24, 1973).

[116]R. SHERRILL, *supra* note 114.

[117]392 U.S. at 24 n.21 (1968).

[118]In the United States 590,160 violent crimes were committed in 1968, 828,150 in 1972; 295.3 violent crimes were committed per 100,000 population in 1968, 397.7 per 100,000

accomplish. Another solution must be found.

Secondly, stop and frisk procedure is a major source of citizen resentment of police.[119] This is true even where police activity conforms to *Terry* and the Model Rules. The problem is much greater when police, as they frequently do,[120] exceed their stop and frisk authority and indulge in activity which more candidly should be called in some cases "stop and fish,"[121] and in other cases "stop and scare the hell out of."[122] Judicial sanction of stop and frisk cannot help but encourage improper official conduct. Courts presumably wish to prevent armed rebellions in urban centers, but at the same time recognize as lawful a form of official conduct which causes the anger and frustration which in turn is one cause of citizen rebellion.[123]

Third, national authorities have documented the fact that police officers, once they have caught a person believed to be guilty, are often willing to "perform minor surgery upon the facts"[124] when testifying in court, in an effort to secure conviction.[125] This "minor surgery" may include a disingenuous explanation either of the police conduct during the stop or frisk, or of the facts known to the police before they undertook the stop or frisk. There is a particular danger of this when a tip from an unnamed informant is alleged to have been the basis for the officer's action. In this situation it is possible that the officer may fabricate the informer's existence,[126] or exaggerate his reliability or the quantity and quality of the information communicated by the informant.[127] Under present law, a judge must simply assume that the police officer acted in good faith and is telling the truth.[128] The judge cannot examine the

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population in 1972. UNIFORM CRIME REPORTS, *supra* note 102, at 61. It should be noted, however, that there has been a notable decrease in the *rate of increase* in violent crimes from 1971 to 1972. *Id.* at 4.

[119]Terry v. Ohio, 392 U.S. 1, 14-17 & nn.11, 14, *citing* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE POLICE 183 (1967); Chevigny, *Police Abuses in Connection with the Law of Search & Seizure,* 5 CRIM. L. BULL. 3, 19 (1969); LaFave, *supra* note 1, at 45.

[120]Brinegar v. United States, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

[121]The phrase is taken from LaFave, *supra* note 1, at 66. For documentation, *see, e.g.,* Chevigny, *supra* note 119, at 20, 21-22, 25; Cook, *Varieties of Detention, supra* note 23, at 312 & n.120.

[122]*See, e.g.,* Chevigny, *supra* note 119, at 14, 16.

[123]Terry v. Ohio, 392 U.S. 1, 14 n.11 (1968).

[124]LaFave, *supra* note 1, at 66 n.126.

[125]Chevigny, *supra* note 119, at 5; *cf.* United States v. Lopez, 328 F. Supp. 1077, 1096 (E.D.N.Y. 1971); LaFave, *supra* note 1, at 66 n.126.

[126]Williams v. Adams, 436 F.2d 30, 36 & n.4 (2d Cir. 1970) (Friendly, C.J., dissenting); Chevigny, *supra* note 119, at 31-32.

[127]Chevigny, *supra* note 119, at 31-32.

[128]McCray v. Illinois, 386 U.S. 300 (1967).

alleged informant because he cannot discover his identity.[129] "[C]onstitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system,"[130] yet in this situation are virtually powerless to deter conduct which clearly undermines their own integrity.

Fourth, many, if not most, of the prosecutions for possession of contraband found and seized pursuant to stops and frisks are for violations of drug laws,[131] rather than for possession of concealed weapons. This is so even though *Terry* made clear that the only justification for stop and frisk is the protection of the police and the public. Because of this, some commentators have urged that the exclusionary rule be applied to all items other than weapons seized in frisk situations:

> [T]o exclude all contraband but weapons discovered during a frisk should in no way frustrate legitimate police activity which is justified in this context only as a means of protecting the officer [and the public]. And under the broad reasonableness analysis adopted in *Terry*, the Court would seem justified in finding a particular police practice—the frisk—reasonable only if hedged with such a novel safeguard.[132]

Finally, though the *Keys* opinion does not discuss the Mississippi Constitution, it is clear that our court has the power to interpret the state constitution in a manner that more zealously protects the rights of the people than does the Federal Constitution as interpreted by the United States Supreme Court in any particular time period.[133] What the

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[129]The sole exception to this rule arises when the informant was an active participant in the crime in which the defendant is charged. Roviaro v. United States, 353 U.S. 53 (1957).

[130]L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 589 (1965), *quoted in* Von Sleichter v. United States, 472 F.2d 1244, 1253 (D.C. Cir. 1972) (Wright, J., dissenting).

[131]The statement was borne out by this writer's reading of hundreds of stop and frisk cases. One judge has expressed his belief that the same is true of airport frisks. United States v. Legato, 480 F.2d 408, 414 (5th Cir. 1973) (Goldberg, J., concurring). In airport frisks, "out of every approximately 15 persons who are frisked one person is found with a weapon." United States v. Lopez, 328 F. Supp. 1077, 1097 (E.D.N.Y. 1971).

[132]*The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 186 (1968); *accord*, Raphael, *supra* note 1, at 304. LaFave, who is generally *for* stop and frisk, believes there "would be considerable merit" to this proposal. LaFave, *supra* note 1, at 65 & n. 126. *But see* United States v. Lopez, 328 F. Supp. 1077, 1096, 1099 (E.D.N.Y. 1971) (*dictum*).

[133]*See* Ker v. California, 374 U.S. 23, 34 (1963). *See generally Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 271 (1973). California state courts have taken the lead in this area. *See, e.g.*, Rios v. Cozens, 9 Cal. 3d 454, 509 P.2d 696, 107 Cal. Rptr. 784 (1973); People v. Krivda, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1973). *See also* Mosk, *The Constitution of California in the Era of the Burger Court and States Rights*, Los Angeles Daily Journal, Dec. 19, 1973,

Mississippi Supreme Court cannot do is *limit* the provisions of the Federal Bill of Rights.[134] Article 3, Section 23 of the Mississippi Constitution guarantees the same rights as does the fourth amendment. If this comment is correct in asserting that the extension of stop and frisk power to Mississippi policemen would be unwise and unnecessary, article 3, section 23 could be employed to so hold. Our court has not hesitated to go beyond its federal counterpart when it has been necessary in the past,[135] and it need not and should not hesitate to do so in the future.

Just as it is evident that "[t]he great generalities of the constitution have a content and a significance that varies from age to age,"[136] it is also evident that the age for watering down, in the name of necessity, the guarantee of protection from unreasonable searches and seizures has not come to Mississippi. As the foregoing quotation implies, how constitutional provisions are interpreted is largely a question of policy. Since we do not need stop and frisk, our court has rightly refused to sanction it.

*Thomas J. Ginger*

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Report Section, at 26-29 (author is California Supreme Court Justice). *Cf.* Gilbreath v. Wallace, No. S.C. 456 (Ala. Sup. Ct., April 4, 1974) (state constitution guarantees 12-member jury in will contest).

[134]*See* Ker v. California, 374 U.S. 23, 34 (1963).

[135]*Compare* Davidson v. State, 240 So. 2d 463 (Miss. 1970) (does not recognize "open fields" doctrine), *with* Hester v. United States, 265 U.S. 57 (1924). *Compare* Smith v. State, 240 Miss. 738, 128 So. 2d 857 (1961) (arrest begins when pursuit begins), *with* Henry v. United States, 361 U.S. 98 (1959). *Compare* Tucker v. State, 128 Miss. 211, 90 So. 845 (1922), *with* Mapp v. Ohio, 367 U.S. 643 (1961) (Mississippi state courts adopted "exclusionary rule" 39 years before *Mapp* commanded it).

[136]B. Cardozo, The Nature of the Judicial Process 17 (1921).

# CRIMINAL SENTENCING: AN OVERVIEW OF PROCEDURES AND ALTERNATIVES

> [I]n no other area of our law does one man exercise such unrestricted power. No other country in the free world permits this condition to exist.[1]

Sentencing procedure in the United States is coming under increasingly harsh criticism. Reasons include the great disparity among sentences[2] and the unfettered discretion of sentencing judges.[3] Both are exacerbated by lack of appellate review.

Disparity can be illustrated statistically. During the 1967-68 term of the United States District Court for the Northern District of Mississippi the average prison sentence imposed for liquor law violations was 14.4 months, while during the same period in the Southern District the average prison term imposed was only 8.5 months.[4] During a 3-year period in New York certain judges never imposed prison terms in draft evasion cases, employing instead alternative forms of sentences; other judges imposed prison terms 15 percent of the time; and still others imposed prison terms in *all* draft evasion cases.[5] A 5-year study of postal theft cases for the Southern District of New York produced similar results. Findings from this study revealed that one judge imposed prison terms in 7 percent of his cases, another in 29.2 percent, and another in 50 percent.[6]

Abuse of discretion by sentencing judges produces seemingly inappropriate sentences at each end of the spectrum: while one Mississippi defendant received an 8-year prison term for stealing a credit card and charging goods valued at $37.75,[7] nine others convicted of firebombing homes of blacks (therefore facing possible death sentences) were placed on probation.[8]

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[1]ABA Project on Minimum Standards For Criminal Justice—Standards Relating To Appellate Review of Sentences (Official Draft 1968). [hereinafter cited as ABA Standards Appellate Review of Sentences (Official Draft 1968)].

[2]*See, e.g.*, Bennett, *Countdown for Judicial Sentencing*, 25 Fed. Prob. 22-24, 1961; Frankel, *Lawlessness in Sentencing*, 24 U. Cin. L. Rev. 1, 7, (1972); Comment, *Discretion In Felony Sentencing—A Study of Influencing Factors*, 48 Wash. L. Rev. 857 (1973).

[3]*E.g.*, M. Frankel, Criminal Sentences 5 (1973); Sobeloff, *Appellate Review of Sentences*, 32 F.R.D. 249, 268 (1962).

[4]Fed. Bureau of Prisons, Nat'l. Prison Statistics, Table B-7 (1967-1968).

[5]H. Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S.B.J. 162, 166 (1972).

[6]*Id.*

[7]Bence v. State, 240 So. 2d 630 (Miss. 1970).

[8]Rubin, *Disparity and Equality of Sentences—A Constitutional Challenge*, 40 F.R.D. 55, 69 (1967).

Although realizing the inequities of the present sentencing system, the Mississippi Supreme Court has regretfully concluded: "We do not have the authority to reduce the sentence as we would prefer to do."[9]

Congress has displayed dissatisfaction with sentencing practices, but repeated attempts to ameliorate the problem through legislation have failed.[10] Appeals from within the legal community for appellate review[11] and alternatives to present sentencing practices have also met with little success.[12] This comment will examine the objectives of sentencing and the current federal and state sentencing practices, explore judicial response to new proposals intended to enhance uniform sentencing, and, finally, discuss the applicability of these proposals to current Mississippi sentencing practices.

## I. Objectives of Sentencing

Philosophies emerging from the Age of Enlightenment[13] put the emphasis in sentencing procedure on the flexibility of sentence imposition within fixed minimum and maximum prison terms.[14] The goal of this "classical school"[15] was to develop a relationship between the nature of the offense and the severity of the penalty.[16] To attain this goal,

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[9]Bence v. State, 240 So. 2d 630, 632 (Miss. 1970).

[10]*E.g.*, S. 2228, 92d Cong., 1st Sess. (1971); H.R. 5180, 91st Cong., 1st Sess. (1969); S. 1561, 91st Cong., 1st Sess. (1969); S. 1561, 91st Cong., 1st Sess. (1969); H.R. 6188, 91st Cong., 1st Sess. (1969); S. 1540, 90th Cong., 1st Sess. (1967). *See* Comment, *Appellate Review of Sentences: A Survey,* 17 St. Louis U.L.J. 221, 229 (1972).

[11]*See, e.g.*, ABA Standards—Appellate Review of Sentences (Official Draft 1968); ABA Project On Minimum Standards For Criminal Justice, Sentencing Alternatives and Procedures (Tentative Draft 1967); Model Penal Code §§ 6.01-7.08 (P.O.D. 1962); National Council On Crime and Delinquency—Advisory Council of Judges, Model Sentencing Act (1963).

[12]Although some proposals are more than 10 years old they have gained little recognition by state or federal courts, and generally have not been adopted.

[13]The Age of Enlightenment, beginning in the mid-eighteenth century, was characterized by a mixture of different tensions and changing views:

> The matrix included, among other elements, class interests, political and ecclesiastical authority, religious convictions, the progress of science, the challenge to values, changing views of history, new economic theories, competing views of man, political dissatisfaction. The tensions generated involved the role of nature and culture, the claims of individuals and society, freedom and order, traditionalism and revolt.

L. Crocker, The Age of Enlightenment 2 (1969).

[14]Comment, *Criminal Procedure—Probable Cause and Due Process at Sentencing,* 50 N. Carolina L. Rev. 925, 927 (1972).

[15]This "classical school" consisted of penologists advocating deterrence of crime as the major objective of punishment, instead of retribution. *See, e.g.*, E. Green, Judicial Attitudes in Sentencing 2 (1961).

[16]*Id.*

the classicalists shifted emphasis from retribution to deterrence as a function of sentencing.

This classical view was challenged by persons advocating the rehabilitation of the offender as the primary goal of sentencing.[17] Currently in vogue is the concept of rehabilitation through individualization of sentencing,[18] with deterrence playing an important but secondary role.[19] Two additional, though less important, considerations are isolation and retribution.[20]

It is not within the scope of this comment to argue the relative merits of these divergent views of sentencing. Rather, the pattern assumed will be that underlying the Model Penal Code[21] and Model Sentencing Act;[22] that is, that there exists a class of offender for whom custodial sentencing is appropriate,[23] and another class which could profit from rehabilitation.[24] Whether rehabilitation is currently available in a prison context is problematic. It is submitted that insofar as it is not available, total custodial sentencing should not be resorted to, but rather, that rehabilitatively oriented alternatives to prison terms should be sought; and further, that only through some continuing emphasis on a rehabilitative goal for at least some offenders will sentencing continue to move toward this most constructive goal.

## II. The Federal Courts and the Doctrine of Nonreview

Refusal to review criminal sentences at the federal appellate level is long standing.[25] This concept, now labeled the "doctrine of nonreview," originated with an 1891 statute[26] omitting a phrase previously allowing federal appellate courts to grant final judgment.[27] The omission was interpreted as signifying congressional disapproval of sentence review.[28]

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[17]*Id.*

[18]Williams v. New York, 337 U.S. 241, 248 (1949).

[19]E. Green, *supra* note 15, at 3.

[20]*E.g.*, Kaufman, *Appellate Review of Sentencing*, 32 F.R.D. 249, 258 (1962).

[21]Model Penal Code (P.O.D. 1962).

[22]National Council On Crime And Delinquency—Advisory Council of Judges, Model Sentencing Act (1963).

[23]M. Frankel, *supra* note 3, at 89.

[24]*Id.*

[25]Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930). *See also* United States v. Tucker, 404 U.S. 443, 447 (1972); Gore v. United States, 357 U.S. 386, 393 (1958); United States v. Rosenberg, 195 F.2d 583, 604 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952).

[26]26 Stat. 826 (1891).

[27]20 Stat. 354 (1879). This omitted phrase stated: "And in case of an affirmance the circuit court shall proceed to pronounce *final sentence* and to award execution thereon." *Id.* (emphasis added).

[28]Freeman v. United States, 243 F. 353, 357 (9th Cir. 1917).

There are presently three exceptions to the doctrine of nonreview[29] and potential for a fourth:[30] (1) sentences will be overturned when constitutional violations accompanying sentencing procedure are identified;[31] (2) sentences imposed mechanically (*e.g.*, without consideration of the nature of the offense and the defendant's character) may also be overturned;[32] (3) review has been justified through an inherent supervisory power over administration of justice in the lower federal courts;[33] and (4) since Section 2106 of Title 28 of the United States Code[34] enables circuit courts to modify sentences on appeal, it has been suggested that this statute could be interpreted to permit review of sentences.[35] This opportunity, however, has not been grasped by the courts.[36]

## III. The State Courts and Sentence Review

Some states[37] have taken steps toward review with the aim of devel-

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[29]33 U. Pitt. L. Rev. 917, 920-26 (1972).

[30]*See, e.g., id.* at 926.

[31]Townshend v. Burke, 334 U.S. 736, 741 (1948). The circuit courts, as well as the Supreme Court, have overturned sentences because of constitutional violations. *E.g.*, Hart v. Coiner, 483 F.2d 136 (4th Cir. 1973); United States v. Weston, 448 F.2d 626 (9th Cir. 1971).

[32]*See, e.g.*, Woosley v. United States, 478 F.2d 139, 144 (8th Cir. 1973); United States v. McKinney, 466 F.2d 1403 (6th Cir. 1972); United States v. Charles, 460 F.2d 1093 (6th Cir. 1972); United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); United States v. Wiley, 267 F.2d 453, 455 (7th Cir. 1959).

[33]Yates v. United States, 356 U.S. 363, 366 (1958). *See also* United States v. West Coast News Co., 357 F.2d 855 (1966); *cf.* Roth v. United States, 255 F.2d 441 (2d Cir. 1958). For a discussion of supervisory powers of the Supreme Court, see Hill, *The Bill of Rights and the Supervisory Power*, 69 Colum. L. Rev. 181 (1969).

[34]28 U.S.C. § 2106 (1970). Section 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside, or reverse any judgment, decree of order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such proceedings to be had as may be just under the circumstances.

*Id.*

[35]33 U. Pitt. L. Rev. *supra* note 29, at 926.

[36]*See* Smith v. United States, 273 F.2d 462, 467-68 (10th Cir. 1959), *cert. denied*, 363 U.S. 846 (1960): "Until the Supreme Court sees fit to hold that Section 2106 applies in such cases, we think this court should apply what appears to be the fixed rule." 273 F.2d at 468. United States v. Hodges, 436 F.2d 676, 678-79 (10th Cir. 1971).

[37]Alaska, Alaska Stat. § 12.55.120 (Supp. 1972); Arizona, Ariz. Rev. Stat. Ann. § 13-1717 (1956); Arkansas, Ark. Stat. Ann. § 27-2144 (1962); California, Cal. Penal Code § 1260 (West 1970); Colorado, Colo. Rev. Stat. § 40-1-509 (1963); Connecticut, Conn. Gen. Stat. §§ 51-194 to -96 (1960); Hawaii, Hawaii Rev. Stat. § 641-24 (1968); Idaho, Idaho Code Ann. § 19-2821 (1948); Illinois, Ill. Rev. Stat. Ch. 110A, § 615(b) (1968); Indiana, Ind. Ann. Stat. § 9-2321 (1956); Iowa, Iowa Code § 793.18 (1971); Kansas, Kan. Stat. Ann. art. 36, § 22-3605 (1971); Maine, Me. Rev. Stat. Ann. tit. 15, § 2141

oping uniform sentencing criteria. These steps have led to the formulation of the five identifiable categories of state programs discussed below.[38]

### A. *The New Jersey Experiment and the Single Sentencing Judge*

Appellate state courts may review trial court discretion in sentencing in New Jersey. This practice, a development of case law, originated in the 1961 case of *State v. Johnson*,[39] wherein the Superior Court of New Jersey concluded "our examination of all the testimony and the presentence reports satisfies us that the consecutive sentences imposed . . . were excessive . . . [and] should have been made concurrent."[40]

New Jersey has instituted single sentencing judges in one field (syndicate gambling offenses) as an experiment in uniformity of sentencing. A single judge in each county sentences all syndicate gambling offenders in that county.[41] Although the system admittedly precludes the sentencing judge from observing courtroom demeanor of offenders in many cases,[42] the New Jersey Supreme Court felt that "the demeanor of the defendant on the stand, if he takes it, ordinarily is not critical. The feel of one case is pretty much the feel of most others."[43] The experiment is limited to gambling cases because "the details of the criminal event are pretty much the same" among such cases.[44] Since this similarity is not characteristic of all crimes, it would not be proper to conclude that a single judge system would be effective in all other types of cases. Further, observation of courtroom demeanor may be more critical in

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(Supp. 1973); Maryland MD. ANN. CODE art. 26, §§ 132-388 (1973); Massachusetts, MASS. ANN. LAWS ch. 278, § 28 (1972); Missouri, MO. SUP. CT. RS. 27.04, .05, .06 (1953); Montana, MONT. REV. CODES ANN. tit. 95, §§ 2501-04 (1969); Nebraska, NEB. REV. STAT. § 29-2308 (1965); New Jersey: State v. Johnson, 67 N.J. Supp. 414, 170 A.2d 830 (App. Div. 1961); New York, N.Y. CONSOL. LAW ch. 11-A, § 470.15 (West 1971); Ohio, OHIO REV. CODE ANN. § 2953.07 (1954); Oklahoma, OKLA. STAT. ANN. tit 22, § 1066 (1958); Oregon, OREG. REV. STAT. § 138.050 (1971); Pennsylvania, PA. STAT. tit. 17, § 211.504 (1962); Tennessee, Brooks v. State, 187 Tenn. 361, 215 S.W.2d 785 (1948); Wisconsin, WIS. STAT. ANN. § 251.17 (1971). Statutes are cited in Comment, *Appellate Review of Sentences: A Survey*, *supra* note 10, at 252-62.

[38]Comment, *Appellate Review of Sentences: A Survey*, *supra* note 10, at 232.

[39]67 N.J. Super. 414, 170 A.2d 830 (1961).

[40]170 A.2d at 842.

[41]State v. DeStasio, 49 N.J. 247, 254, 229 A.2d 636, 640, *cert. denied*, 389 U.S. 830 (1967). The single sentencing judge originated from an administrative policy decision of New Jersey judges. *Id.*

[42]The observation of the defendant by the trial judge appears to be a strong contention of opponents to appellate review of sentencing. *E.g.*, Woosley v. United States, 478 F.2d 139, 144 (9th Cir. 1973); Brewster, *Appellate Review of Sentences*, 40 F.R.D. 79, 82 (1965).

[43]State v. DeStasio, 49 N.J. 247, 254, 229 A.2d 636, 640 (1967).

[44]*Id.*

other types of cases, so that its loss might diminish any effectiveness of individualized sentencing.

### B. *Appellate Review Created by Statute and the Appellate Review Court*

Differing review procedures have been created by statute in several jurisdictions.[45] Of particular interest is the method adopted by Connecticut,[46] Maine,[47] Maryland,[48] and Massachusetts.[49] These states empower either panels or special courts to review sentences. In Maryland, for example, any person sentenced to serve 2 years or more without suspension or sentenced to death is entitled of right to a sentence review by a three-judge panel convened from the judicial circuit in which the sentencing court sits.[50] Cases interpreting the Maryland statute reveal that its major effect is to review justness of punishment; to that end panels have increased as well as decreased sentences on review.[51]

The panels have been criticized as potentially subjecting the system to a flood of frivolous appeals;[52] however, fear of increased sentences should limit such a flood. It has also been argued that sentencing is discretionary, not a matter of law, and should be left exclusively to the trial judge.[53] Finally, opponents fear that the panel's lack of opportunity

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[45]*See* authorities cited note 37 *supra*.

[46]Conn. Gen. Stat. Ann. §§ 51-194, -196 (1960).

[47]Me. Rev. Stat. Ann. tit. 15, § 2141-44 (Supp. 1965).

[48]Md. Ann. Code art. 26, §§ 132-38 (1973).

[49]Mass. Ann. Laws ch. 278, § 28 (1972).

[50]Md. Ann. Code art. 26, §§ 132-38 (1973).

[51]Robinson v. Warden, Md. House of Correction, 455 F.2d 1172, 1174-75 (1972). When a defendant faces the possibility of a harsher sentence upon exercising a right of review, constitutional problems are raised. *See* North Carolina v. Pearce, 395 U.S. 711 (1969) (upholding vacation of sentence on due process grounds when much harsher sentence was imposed after appeal and trial de novo, and no "objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" was reflected in the record. *Id.* at 726); Faye v. Noia, 372 U.S. 391 (1963) (granting habeas corpus despite no exhaustion of state remedies when those remedies were made effectively unavailable by threat of death penalty). The Supreme Court has never considered a sentence increased by a review board; it has held, however, "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." North Carolina v. Pearce, *supra* at 723. In holding that increase of sentence by the Maryland sentence review board did not violate due process, the Fourth Circuit Court of Appeals said, "*Pearce's* ruling on due process is, however, not altogether inapplicable to sentence review. Though a state need not provide sentence review, if it does, it may not discourage applications for relief by vindictively imposing harsher sentences on those who exercise their statutory right." Robinson v. Warden, 455 F.2d 1172, 1177 (1972).

[52]ABA Standards—Appellate Review of Sentences (Official Draft 1968) at 5.

[53]*Id.*

to view courtroom demeanor of defendants could diminish its ability to select the most appropriate sentence.[54]

### C. *The Alaskan Review Procedure*

The Alaskan review procedure is also statutory, providing for state supreme court review of sentences appealed by the defendant, *or* by the state if the sentence is alleged to be too lenient.[55] If the state appeals, the court may only affirm or overturn the sentence unless the defendant also appeals, in which case the court may increase or decrease the sentence.[56]

### D. *Extrajudicial Sentencing*

California[57] and Washington[58] have given extrajudicial boards power to fix sentences. California's Adult Authority may set maximum and minimum sentences for offenders only if the trial judge deems imprisonment to be appropriate.[59] Underlying this "combination of functions" is the idea that while the trial judge is in the best position to know whether imprisonment should be imposed, the members of the Authority, with their penological backgrounds, are best qualified to evaluate the needs of the offender.[60] The California system is founded on a rehabilitative norm: the board may grant probation to offenders when it deems them to be "rehabilitated,"[61] but not before.[62]

The California system has been attacked[63] by opponents charging that such boards may set, reset, and change again the same sentence, giving the board too much power, and potentially demoralizing prisoners.[64] A second, more recent attack on the boards[65] resulted from the California Supreme Court's decision in *In re Lynch.*[66] Lynch spent 5

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[54]Walsh, *Appellate Review Of Sentences,* 32 F.R.D. 249, 277 (1962).

[55]ALASKA STAT. tit. 12, § 12.55.120, -.120(a), -.129(b) (1972).

[56]ALASKA STAT. tit. 12, § 12.55.120(b) (1972).

[57]CALIF. ANN. CODE § 5077 (1970).

[58]WASH. REV. STAT. ANN. § 9.95.040 (1961). *See also* 11 AM. CRIM. L. REV. 695 (1973).

[59]CALIF. ANN. CODE § 5075 (1970); 11 AM. CRIM. L. REV., *supra* note 58, at 709; 10 SAN DIEGO L. REV. 793, 800 (1973).

[60]Frankel, *Lawlessness in Sentencing,* 41 U. CINN. L. REV. 1, 29-34 (1972).

[61]*Id.*

[62]*Id.*

[63]*Id.*; Rubin, *supra* note 8, at 57. *See also,* J. Mitford, *Kind and Usual Punishment in California,* ATL. MONTHLY, March 1971 at 45. In her attack on the California system, Jessica Mitford points out that the average time spent with a prisoner by the Adult Authority is 17 minutes and that since the adoption of the system the average sentence served by a felony first offender was 36 months—the highest in the nation. *Id.* at 47.

[64]J. MITFORD, *supra* note 63, at 47. *See* Frankel, *supra* note 60; Rubin, *supra* note 8.

[65]10 SAN DIEGO L. REV., *supra* note 59.

[66]8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

years in prison for indecent exposure, during which time the Adult Authority rejected his plea for sentence reduction four times before the supreme court, finding his sentence excessive, granted his writ of habeas corpus. In reviewing this decision, one authority has stated: "in a very real sense it *was* the action of the Adult Authority which was reviewed because the cruel or unusual punishment issue would never have arisen, but for its inaction."[67] Although such a result is an indictment of the functioning of the board in at least an administrative sense, it does not impeach the utility of such boards in enhancing uniformity of sentence. *Lynch* also illustrates the value of establishing procedures for the review of decisions of such boards, so that extraordinary and time consuming relief need not be sought.

### *E. Sentencing Review by General Statute*

Some state legislatures have enacted a means of appellate review through statutes worded similarly to Section 2106 of Title 28 of the United States Code.[68] These statutes generally allow the courts to "affirm, reverse, or modify" judgments.[69] It appears that the state courts have not followed the federal judiciary's lead in refraining from interpreting these laws as allowing appellate review of sentences.[70]

Such statutes may be used both to cure abuses of trial judge discretion and to enhance uniformity of sentences granted by the lower court. It would seem preferable, however, to provide for these goals at the trial level, thereby avoiding the expense and the overburdening of court dockets caused by frequent review. Upon the alleviation of this need for curative review, the statute could assume a "back-up" status.

## IV. New Proposals in Criminal Sentencing

### *A. The Model Sentencing Act, the Model Penal Code, and Categorization of Felonies*

The National Council on Crime and Delinquency proposed the Model Sentencing Act (MSA) as an alternative to present policies. The MSA was intended to be:

> liberally construed to the end that persons convicted of crime shall be dealt with in accordance with their individual characteristics, circumstances, needs and potentialities as revealed by case studies; that dangerous offenders shall be correctively treated in custody for long terms as needed; and that other offenders shall be dealt with by probation,

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[67] 10 San Diego L. Rev. *supra* note 59, at 812.
[68] 28 U.S.C. § 2106 (1970).
[69] *See, e.g.*, Iowa Code § 793.18 (1971).
[70] Comment, *Appellate Review of Sentences: A Survey, supra* note 10, at 252-53.

> suspended sentence, or fine whenever such disposition appears practicable and not detrimental to the needs of public safety and the welfare of the offender, or shall be committed for a limited period.[71]

The MSA goes on to provide the following comprehensive definition of "dangerous offender":

> (a) [one who] inflicted or attempted to inflict serious bodily harm, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity.
> (b) The defendant is being sentenced for a crime which seriously endangered the life or safety of another, has been previously convicted of one or more felonies not related to the instant episode, and the court finds that he is suffering from a severe personality disorder indicating a propensity toward criminal activity.
> (c) The defendant is being sentenced for the crime of extortion, compulsory prostitution, selling or knowingly and unlawfully transporting narcotics, or other felony, committed as a part of a continuing criminal activity in concert with one or more persons.[72]

Under the MSA "dangerous" offenders face jail terms of up to 30 years; while Section Nine of the MSA, which provides for nondangerous sentencing including suspended sentences and probation, permits jail terms of up to 5 years. It appears, therefore, that the MSA employs a mix of custodial sentencing, for the most "dangerous" offenders, and individualized, rehabilitative sentencing (with the emphasis on alternatives to incarceration) for the less dangerous offender for whom such treatment would appear constructive. At the same time, substantial prison terms are available for lesser offenders who, although not "dangerous," are presumably not appropriate subjects for rehabilitation. In effect this system categorizes felonies according to the degree of violence of the offense and the individual characteristics of the offender. This approach strikes a balance between societal interests and provision for rehabilitation of appropriate prisoners.

The American Law Institute has also drafted a model code which categorizes felonies.[73] The Model Penal Code (MPC) provides for three degrees of felonies: (1) first degree, carrying a prison term of not less than 5 to 10 years, and a maximum of 20 years or life;[74] (2) second degree, with a minimum of 1 to 3 years and a maximum of 10 years;[75]

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[71]NATIONAL COUNCIL ON CRIME AND DELINQUENCY—ADVISORY COUNCIL OF JUDGES, MODEL SENTENCING ACT § 7 (1963).

[72]*Id.*

[73]MODEL PENAL CODE § 6.06 (P.O.D. 1962).

[74]*Id.* § 6.06(1).

[75]*Id.* § 6.06(2).

and (3) third degree, with a 1-year minimum, maximum 2 years in prison, and a 5-year total sentence maximum.[76] A special section provides extended sentences in cases of recidivism.[77] The MSA and the MPC both employ indeterminate sentencing, but only the MPC requires that minimum as well as maximum periods of internment be specified. The strict rehabilitative sentencing theory underlying the MSA rejects minimum sentences on grounds that the prisoner might become rehabilitated and thus eligible for parole before the term of the minimum sentence. The MPC, on the other hand, appears to strike its balance somewhat more in favor of a custodial norm, thereby providing a larger measure of protection to society although at some potential rehabilitative cost. Both plans also emphasize use of parole, suspended sentences, and other alternatives to incarceration,[78] reflecting the attitude of many authorities that current prison terms are generally too long.[79]

By categorizing offenses and delineating sentences pursuant to such categorization, both proposals limit judicial discretion which operates to enhance uniformity of sentencing. While individualized, rehabilitative sentencing may appear at odds with uniformity of sentences, it is submitted that a carefully applied uniform theory of sentencing—not simple *similarity* of sentences—is the true goal of "uniform" sentencing, and that this goal may be achieved in a variable-sentence context. The MSA reflects this approach, eschewing minimum sentences and thereby allowing maximum sentence flexibility. The MPC, however, provides for more mechanically uniform sentences through its use of minimum sentences in each category where prison detention is deemed appropriate. Some element of retribution may also be in operation.

### *B. Sentencing Institutes*

Congress created sentencing institutes to promote uniformity in sentencing.[80]

> The Attorney General and/or the Chief of each circuit may at any time request . . . the Judicial Conference to convene such institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, standards, and criteria for sentencing . . . .[81]

The first institute was held in 1959. Results of the institutes are reported

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[76] *Id.* § 6.06(3).

[77] *Id.* § 6.07.

[78] *E.g.*, Model Penal Code § 6.10; National Council On Crime And Delinquency, Advisory Council Of Judges, Model Sentencing Act § 1 (1963).

[79] *E.g.*, ABA Project On Minimum Standards For Criminal Justice; Standards—Sentencing Alternatives and Procedures 56 (Tentative Draft 1967).

[80] 28 U.S.C. § 334 (1964).

[81] *Id.*

to all members of bench and bar in Federal Rules Decisions.[82] While these institutes have proven helpful in increasing judicial awareness of weaknesses in current sentencing procedure, their value must not be exaggerated. They occur too infrequently, and have been said to be ineffective in changing philosophies of attending judges.[83]

### C. *Sentencing Councils*

Sentencing councils are a highly successful innovation in developing sentencing theory. The program of appointing sentencing councils began in the federal courts of the Eastern District of Michigan, and has spread to two other federal district courts and two state courts.[84] These councils consist of the sentencing judge and two other judges who sit in the same jurisdiction.[85] Each judge writes a sentence recommendation after considering presentence reports and other pertinent material.[86] The sentencing judge may pronounce any sentence he feels is appropriate, but it appears that the opinions of the other judges are carefully considered.[87] The councils have enhanced uniformity of sentence[88] and have aided judges in deciding which criteria should be influential in the sentencing decision.[89]

> [Of] factors presently considered, most significant are the offenders' prior record, family responsibility, work record, the likelihood that the defendant will respond to probation, and whether custody is required for either rehabilitation or for the protection of the public.[90]

The councils help make new judges aware of alternatives to commitment and offer them an opportunity to interact with fellow members of the bench.[91] Since these councils work to train judges directly in use of discretion and uniformity of sentencing, review of sentencing should

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[82]Youngdahl, *Development and Accomplishments Of Sentencing In the Federal Judicial System*, 45 NEB. L. REV. 513, 518 (1966).

[83]M. FRANKEL, *supra* note 3, at 64.

[84]11 AM. CRIM. L. REV., *supra* note 58, at 697. The two other federal district courts are the District Court for the Eastern District of New York and the District Court for the Northern District of Illinois. The two state courts are the New York Supreme Court for Bronx County and the Superior Court for the District of Columbia.

[85]Levin, *Toward A More Enlightened Sentencing Procedure*, 45 NEB. L. REV. 499, 503-04 (1966).

[86]*Id.*

[87]*Id.* at 505-06; Zavatt, *Proceedings of the Institute On Sentencing*, 54 F.R.D. 285, 333-37 (1968).

[88]Zavatt, *supra* note 87.

[89]Levin, *supra* note 85, at 505.

[90]*Id.* at 508.

[91]Zavatt, *supra* note 87, at 337.

decline in importance. Their responsiveness to a particular sentencing norm will depend upon the policies most favored in the jurisdiction in which the council sits since the council format does not inherently suit one theory of sentencing better than any other.

In spite of the advantages mentioned above, sentencing councils do have serious mechanical drawbacks. For instance, where one judge sits for an entire district, or where many miles separate judges, the system may be physically impractical.[92] A more serious problem, however, is that the councils occupy too much of the judges' time. In this day of swollen dockets, this may be a fatal drawback.[93]

### *D. Equal Protection and Sentencing*

Some defendants[94] are now claiming that differing sentences for similar offenses violate the equal protection clause of the 14th amendment.[95] If accepted and applied at face value, this allegation would greatly curtail use of individualized sentencing.

Should disparities in sentencing not be rationally related to a legitimate governmental interest, or should a fundamental individual right be infringed upon in favor of a less than compelling state interest, relief under the equal protection clause would appear justified. With regard to the latter test, the Burger Court has manifested its unwillingness to add to the list of interests considered fundamental,[96] so that unless the sentencing disparity could be linked to some interest already labeled fundamental, this test would not be invoked. With regard to the former test, a rational state interest might be found in the enhancement of chances for rehabilitation of a particular prisoner,[97] or in the protection of the public from a particularly dangerous one.[98]

### *E. The Indeterminate Sentence*

The indeterminate sentence is one having a fixed maximum term and contemplating earlier release should the parole board (or other appropriate authority) determine that the offender has been rehabilitated.[99] Proponents of the concept argue that the chance of early release

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[92]Levin, *supra* note 85, at 508.

[93]*Id.*

[94]United States v. McCord, 466 F.2d 17 (2d Cir. 1972); Florida *ex rel.* Thomas v. Culver, 253 F.2d 507 (5th Cir. 1958).

[95]U.S. CONST. amend. XIV.

[96]Lindsey v. Normet, 405 U.S. 56 (1972); Richardson v. Belcher, 404 U.S. 78 (1972); *see* Gunther, *The Supreme Court 1971 Term*, 86 HARV. L. REV. 1, 12 (1972).

[97]Comment, *The Emergence of Individualized Sentencing*, 45 TEMPLE L.Q. 351, 358 (1971).

[98]*Id.* at 359, 360.

[99]Frankel, *supra* note 60, at 29.

encourages prisoners to welcome and strive for rehabilitation, while fixed sentences, by divorcing reward from desired conduct, promote cynicism and noncooperation.

It has been seen that both the Model Sentencing Act and Model Penal Code make provision for indeterminate sentencing while providing for custodial sentencing of "dangerous" offenders. The Model Act, by calling for no minimum prison terms, is more indeterminately oriented. It allows maximum application of the theory that a prisoner should be released as soon as he is determined to be rehabilitated.[100] The Model Penal Code, on the other hand, provides a custodial, society-protective period of incarceration for all offenders for whom jail terms are considered appropriate.[101]

Such indeterminate sentencing is presently under attack[102] as being ambiguous and inconsistent; and further, on the basis that absolute adherence to this norm presumes all criminals to be ill and appropriate subjects for rehabilitative efforts.[103] For an indeterminate system to be meaningful it must be shown that:

> (1) The person has some identifiable disorder apart from the mere biographical datum of his offense;
> (2) the disorder in some verifiable way is causally related to the offense;
> (3) the penologists or judges or somebody in authority knows some way and place for treatment of the disorder.[104]

The last of the above criteria has been under particularly strong attack.

> The sentence purportedly tailored to the cherished needs of the individual turns out to be a crude order for simple warehousing. The prison characteristically has no treatment facilities of any substantial nature. The means for rehabilitation, undefined and probably unknown, are not at hand.[105]

Thus both the theory and application of indeterminacy are under attack. With regard to the theory, it would seem beyond dispute that a class of offender exists for which rehabilitation is not a realistic goal.[106] For this class, deterrence (and isolation) would seem appropriate, and therefore, so would custodial sentencing. It would seem beyond the com-

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[100] *E.g.*, NATIONAL COUNCIL ON CRIME AND DELINQUENCY, ADVISORY COUNCIL OF JUDGES, MODEL SENTENCING ACT §§ 1, 9 (1963).

[101] MODEL PENAL CODE § 6.06-.07 (P.O.D. 1962).

[102] *E.g.*, M. FRANKEL, *supra* note 3, at 88.

[103] *Id.* at 88, 89.

[104] *Id.* at 89, 90.

[105] *Id.* at 93.

[106] *Id.* at 89.

petence of the legal profession, however, to assume that all criminals fall into such a class. There obviously are other criminals who can respond to rehabilitation. It is toward this class that the rehabilitative policies of indeterminacy are directed.

Given that there is such a class, how is it identified, and how are its members to be treated? The lack of convincing answers to these questions fuels attacks upon the application of indeterminacy. Some such systems have even backfired. For example, the California system, intended to promote fairness in sentencing, worked so poorly that the prisoners themselves requested its dissolution.[107] Lack of immediate answers, however, should not discourage attention to what is potentially the most constructive mode of sentencing. To abandon indeterminacy altogether would be to abandon as many opportunities as there are appropriate subjects for rehabilitation. Systems such as the two model proposals already discussed which balance provisions for societal protection against provisions for indeterminacy would seem to take the most profitable long-term view relative to society's best interest.

For these reasons, indeterminacy should not be confused with disparity of sentencing. It should be clear that a uniform application of indeterminacy is an equitable form of sentencing. Further, where judicial discretion is reviewed, the reviewing body should take care to evaluate the same criteria taken into consideration by the trial judge in determining an appropriate indeterminate sentence for a particular offender.

### *F. Appellate Review of Sentence: The ABA Proposal*

The American Bar Association has advocated review of sentences through the normal appellate process.[108] The purposes of review would be to:

> (i) correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and protection of the public interest;
> (ii) facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
> (iii) promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
> (iv) promote the development and application of criteria for sentencing which are both rational and just.[109]

These objectives reveal concern with not only disparate and excessive sentences but with rehabilitation, declining respect for the law, and

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[107] J. Mitford, *supra* note 63, at 47.
[108] ABA Standards—Appellate Review of Sentences § 2.1 (Official Draft 1968).
[109] *Id.* § 1.2.

development of rational criteria in sentencing.

The American Bar Association Standards Relating to Appellate Review of Sentences[110] rejects establishment of separate appellate courts for sentencing because such a program might fragment the appellate courts[111] as well as be prohibitively expensive. Under the ABA plan an individual would have an appeal by right,[112] and the right to appointed counsel if necessary.[113] In courts of more than three judges, the plan permits sentencing councils of three judges.[114] The offender would begin serving his sentence despite his appeal, unless granted bail.[115]

The tentative draft did not allow increases in appealed sentences;[116] it was feared that the possibility of increased sentences would restrict the number of appeals. On the other hand, it was feared that inability of the court to increase the sentence might encourage frivolous appeals.[117] The final draft omitted the prohibition of increases.[118]

The ABA proposal would provide uniformity of sentencing and a check on trial judge discretion in the same manner that the present appellate system performs those functions in application of the laws. The proposal is not totally comprehensive; however, it does not provide for enhancement of these objectives through the training of the trial bench. Such training would reduce the need for review, thereby reducing the increase in workload that the ABA proposal would represent for the appellate bench.

## V. Proposed Revisions in Sentencing in Mississippi

As shown by the examples at the beginning of this comment, Mississippi is not an exception to complaints of a national trend toward disparate and excessive sentences.[119] Further, the Mississippi Supreme Court, as mentioned previously, has refused to review sentences.[120] "One

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[110]*Id.* § 2.1.

[111]*Id.* § 4.

[112]*Id.* § 2.2. (b) (ii).

[113]*Id.* § 2.2 (b) (iii).

[114]*Id.* § 2.2 (b) (viii).

[115]*Id.* § 2.2 (b) (ix.).

[116]ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences § 3.4 (a) (Tent. Draft 1967).

[117]*Id.* at 5.

[118]ABA Standards—Appellate Review of Sentences §§ 2, 3 (Official Draft 1968).

[119]*E.g.*, Bence v. State, 240 So. 2d 630 (Miss. 1970). *See also* authority cited note 4 *supra*.

[120]Barnes v. State, 220 Miss. 248, 251, 70 So. 2d 920 (1954). Alabama, Florida, Georgia, Kentucky, Louisiana, Michigan, Minnesota, North Dakota, South Dakota, and Texas also refuse to grant appellate review of sentences. Delaware, Nevada, New Hampshire, New Mexico, North Carolina, Rhode Island, South Carolina, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming appear to be undecided on the issue of appellate

of the most important functions of the circuit judge in criminal cases is to determine punishment of the accused. His actions in this regard are not reviewable."[121] A new approach to sentencing in Mississippi should be taken contemplating uniformity and appropriateness of punishment, and should be pursuant to a rational theory of sentencing. The following approach, based on the basic theories underlying the Model Penal Code, the Model Sentencing Act, and the ABA Standards is suggested: A mix of society-protective custodial sentencing with indeterminancy, based on a categorization of felonies. In addition, alternatives to imprisonment should be emphasized for the less "dangerous" categories.

A necessary first step to such an approach would be review of the criminal statutes to ensure that statutory penalties bear a rational relation to offenses for which they are imposed.[122] Additionally, the statutes can be used to aid judges in determining the appropriate criteria to consider when making the sentencing decision.

Fixed minimum prison terms which appear in the statutes[123] should be reevaluated in terms of their consistency with the rehabilitative norm, insofar as it is adopted by the State as an element of sentencing theory. Alternatives to minimum sentences and to jail terms generally should be explored in light of evidence that extended incarceration may deleteriously affect prisoners.[124] Similarly, statutes empowering courts to incarcerate those unable to pay fines[125] seem to bear no reasonable relation to any theory of sentencing; alternatives to imposition of such jail terms should be sought.

As a second step in its new approach to sentencing, Mississippi

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review. *See* Comment, *Appellate Review of Sentences: A Survey, supra* note 10, at 252-62.

[121]Barnes v. State, 220 Miss. 248, 251, 70 So. 2d 920, 921 (1954).

[122]*E.g.*, assault with intent to rape carries a maximum penalty of life imprisonment, while assault with intent to kill carries a maximum penalty of not more than 10 years confinement. Miss. Code Ann. §§ 97-3-7, -71 (1972). Stealing a dog carries a maximum penalty of not less than 1 nor more than 3 years confinement, while torturing or cruelly beating a dog carries a maximum penalty of not more than a 1-year confinement. Miss. Code Ann. §§ 97-17-51, 97-41-1 (1972). *See also* Miss. Code Ann. §§ 97-3-7,-71,-41-1 (1972).

[123]*E.g.*, Miss. Code Ann. §§ 47-7-3, 99-19-19 (1972).

[124]*See* ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Sentencing Alternatives and Procedures § 3.1, comment d, at 141 (Approved Draft 1968).

[125]Miss. Code Ann. § 99-19-19 (1972). This section empowers the court to commit any convict unable to pay fines, costs, and jail fees. The application of this statute would appear unconstitutional in light of Tate v. Short, 407 U.S. 395 (1971). However, this statute is still in effect in Mississippi. McKinney v. State, 260 So. 2d 444 (Miss. 1972); *see* 44 Miss. L.J. 556 (1973).

should adopt a program designed to develop criteria to guide sentencing. Such a program might include periodic conferences of judges, perhaps modeled after the federal sentencing institutes.[126] Publication of the proceedings of these institutes would allow nonattending judges to benefit from them.

Although Mississippi is largely a rural state, sentencing councils could be employed in at least some areas, especially where case loads are relatively light.[127] Statistics show the value of such councils[128] in developing rational sentencing criteria and enhancing judicial interaction.[129]

Criminal judges typically assume the bench with no training in penology.[130] Offering corrections programs through State law schools could relieve this situation. Additionally, new judges could be provided with sentencing orientation programs concerning goals and theory of sentencing, including alternatives to confinement.[131] Finally, judges should become familiar with State and federal penal institutions and the facilities available therein for rehabilitation.[132]

In Mississippi, as is true nationally, judges are not required to make written reports delineating the considerations used in arriving at sentence.[133] Such reports would be valuable as references for all courts later faced with similar situations, and thereby clearly enhance the possibility of uniformity in sentencing. The reports also would be invaluable to a higher court reviewing the sentence.

Also useful would be statewide compilation of statistics reflecting the nature of offenses, characteristics of the offenders, and sentences imposed. Again, uniformity of sentencing would be the chief advantage if such a compilation were available to the State bench.

All of the above suggestions should work to enhance uniformity of sentencing and to provide rational criteria to guide the exercise of judicial discretion. As a reinforcing measure, Mississippi should provide for review of sentences by the supreme court. A program modeled after the American Bar Association Standards would be appropriate. It would be easy to implement, since the machinery already exists, and would provide the smoothest, most economical enforcement of uniformity and

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[126]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 7.2 (Approved Draft 1968).

[127]*Id.* § 7.1.

[128]Levin, *supra* note 85, at 511.

[129]*Id.* at 505-08.

[130]Frankel, *supra* note 60, at 6-7.

[131]ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES § 7.3 (APPROVED DRAFT 1968).

[132]*Id.* § 7.4.

[133]*See* Frankel, *supra* note 60, at 9.

review of discretion, since the appellate courts already perform these functions in other areas of the law.

## VI. Conclusion

Sentencing is perhaps the most dynamic phase in the judicial process; it is the moment when the power of the law directly touches the offender. When sentencing an offender, the judge should direct his sentence at providing the greatest chance for rehabilitation while providing for the protection of society, and promoting respect for the judiciary.

This important phase is presently characterized by disparity and abuse of judicial discretion. To prevent such inequities, provision should be made in each jurisdiction to develop a rational theory of sentencing. Probably the most practical and equitable basis is that employed by the National Council on Crime and Delinquincy, the American Law Institute, and the American Bar Association in drafting their model legislation. A mixture—proportions of which would be decided by individual states—of society-protective custodial sentencing with indeterminacy, based on a categorization of felonies, taking into account the nature of the offense and the characteristics of the offender, with emphasis on alternatives to incarceration for the less "dangerous" categories is called for.

The doctrine of sentencing should be disseminated among the bench; and machinery should then be provided to enhance uniformity of application of the doctrine, and to minimize abuses of discretion.

Finally, as a check on the operation of the system at the trial level, the state supreme court must assume duties of sentence review.

*Mark Phillip Rabinowitz*

# RECENT DECISIONS

CONSTITUTIONAL LAW—SEARCH AND SEIZURE—FULL SEARCH OF TRAFFIC VIOLATOR INCIDENT TO CUSTODIAL ARREST IS REASONABLE UNDER THE FOURTH AMENDMENT

Respondent, Willie Robinson, Jr., was convicted in the District Court for the District of Columbia of possession of heroin[1] discovered on his person in a full search[2] incident to his arrest for a traffic violation.[3] During the search the officer removed a cigarette package from respondent's coat pocket, opened it, and found heroin.[4] The defendant contended that the search of his person should have been limited to a frisk of his outer clothing since the only purpose of the search should have been to discover weapons.[5] The government contended that a full field search of an arrestee's person was justified by a lawful arrest and that the officer was following prescribed police procedure.[6] The Court of Appeals for the District of Columbia reversed the conviction holding that the removal of the cigarette package exceeded the permissible scope of a weapons search.[7] On certiorari to the Supreme Court, *held*, reversed. Where a lawful custodial arrest is made for a traffic violation a full search of the arrestee's person is presumed reasonable under the fourth amendment; the search is not limited to a search for fruits or evidence of the crime for which the arrest was made or by the improbability of the arrestee's being armed. *United States v. Robinson*, 94 S. Ct. 467 (1973).[8]

The right to search the person of an arrestee incident to a lawful arrest originated in England[9] and has gone virtually unchallenged in the United

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[1]The conviction was for possession and facilitation of concealment of heroin in violation of Narcotic Drugs Import and Export Act § 2, 35 Stat. 614 (1909) *as amended* 21 U.S.C. § 801 (1970); Regulatory Tax Act Ch. 736, 68 A Stat. 550 (1954) *as amended* 21 U.S.C. § 801 (1970).

[2]The testimony in the Court of Appeals described a full field search as one in which the contents of all pockets are examined along with anything else found on the arrestee's person. The areas of search include collar, waistband, cuffs, socks and shoes. United States v. Robinson, 94 S. Ct. 467 n.2 (1973).

[3]Four days prior to arrest Respondent was stopped in a routine spot check and the officer noticed a discrepency between the age on the operator's license and on the selective service card. The officer discovered from a subsequent investigation that Respondent was driving with a revoked permit and stopped him again for that reason on the day of the arrest. *Id.* at 478.

[4]The arresting officer testified that he never feared for his safety and that the search was not specifically motivated by a need to discover weapons. *Id.* at 467 n.7.

[5]The Court of Appeals first remanded the case for an evidentiary hearing. United States v. Robinson, 447 F.2d 1215 (D.C. Cir. 1972), *rev'd*, 94 S. Ct. 467 (1973).

[6]94 S. Ct. 467 n.2 (1973).

[7]*See* Terry v. Ohio, 392 U.S. 1 (1968).

[8]The companion case was Gustafson v. Florida, 94 S. Ct. 488 (1973).

[9]*See* Dillon v. O'Brien & Davis, [1887] 16 Cox Crim. Cas. 245, *cited in* United States v. Robinson, 94 S. Ct. 467 (1973). *See also* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 578-82 (2d ed. 1898); T. TAYLOR, TWO STUDIES IN CONSTITUTION INTERPRETATION (1969).

States.[10] While there is authority in early English cases for the concept of a limited search incident to arrest,[11] the Supreme Court first defined the scope of an incident-search in *Weeks v. United States*.[12] In *Weeks* the Court held an arrestee may be searched "to discover and seize the fruits or evidences of crime."[13] In a series of cases following *Weeks*, beginning with *Carroll v. United States*,[14] the Supreme Court attempted further to delineate the permissible scope of a reasonable search incident to arrest. The Court never questioned the right to search the arrestee's person, but instead dealt with the area under the arrestee's control which could lawfully be searched. Although the "area of control" varied greatly from case to case,[15] the Court uniformly maintained that the purpose of a reasonable incident-search must be to discover weapons, fruits, or implements of the crime for which the arrest was made.[16] The Court's limitation of the scope of a reasonable incident-search in *Chimel v. California*[17] was influenced by its decisions the previous year in *Peters v. New York*,[18] *Terry v. Ohio*,[19]

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[10]*See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964); Harris v. United States, 331 U.S. 145 (1947); Marron v. United States, 275 U.S. 192 (1927); Carroll v. United States, 267 U.S. 132 (1925); Weeks v. United States, 232 U.S. 383 (1914); United States *ex rel.* Walls v. Mancusi, 406 F.2d 505 (2d Cir. 1969), *cert. denied*, 395 U.S. 958 (1969); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); Johnson v. State, 145 So. 2d 156 (Miss. 1962); Closson v. Morrison, 47 N.H. 482 (1867); Spalding v. Preston, 21 Vt. 9 (1848), *cited in* United States v. Robinson, 94 S. Ct. 467 (1973).

[11]*See* Dillon v. O'Brien & Davis, [1887] 16 Cox Crim. Cas. 245 (a seizure of certain papers was justified as necessary to prevent their destruction as evidence); Leigh v. Cole, [1853] 6 Cox. Crim. Cas. 329 (the court said that the right to search an individual depends upon the circumstances of the case).

[12]232 U.S. 383 (1914). The Court established the federal exclusionary rule of the fourth amendment which provides that any evidence seized in violation of that amendment will be excluded from court in criminal cases. The rule was later applied to the states in Mapp v. Ohio, 367 U.S. 643 (1961). Mississippi adopted the federal exclusionary rule of *Weeks* in Tucker v. State, 128 Miss. 211, 90 So. 845 (1922).

[13]232 U.S. at 392.

[14]267 U.S. 132 (1925) (area of search expanded to include area within arrestee's control).

[15]United States v. Rabinowitz, 339 U.S. 56 (1950); Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145 (1947); United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Co. v. United States, 282 U.S. 344 (1931); Marron v. United States, 275 U.S. 192 (1927). For good discussion of these cases see 43 Miss. L.J. 196 (1972); 69 Colo. L. Rev. 866 (1969); Annot., 10 A.L.R.3d 314 (1966).

[16]Cases cited note 15 *supra*; Wright v. Edwards, 343 F. Supp. 792 (N.D. Miss. 1972); Smith v. State, 128 So. 2d 857 (Miss. 1961); Cody v. State, 167 Miss. 150, 148 So. 627 (1933); Bird v. State, 154 Miss. 493, 122 So. 539 (1929); Tolliver v. State, 133 Miss. 789, 98 So. 342 (1923).

[17]395 U.S. 752 (1969) (scope limited to arrestee's person and area within immediate control or reach). *See also* Cupp v. Murphy, 412 U.S. 291 (1973), in which the Court said a pre-arrest search was constitutional under the principles of *Chimel v. California*. *Id.* at 296.

[18]392 U.S. 40, 66 (1968) (officer discovered possible weapon during pat down of outer clothing).

[19]392 U.S. 1 (1968). The Court held that police may stop a person on the street and

and *Sibron v. New York*.[20] The incident-search of an arrestee's person was reasonable in *Peters* because its scope was limited by the purpose of the search and because the officer "did not engage in an unrestrained and thoroughgoing examination of Peters and his personal effects."[21] In *Terry* the Court upheld a limited pre-arrest frisk for weapons during an investigatory stop where it was reasonable for the officer to believe the suspect was armed and dangerous. The Court reasoned that the scope of the search must be limited to a pat-down of the outer clothing since the "sole justification" for the search was the protection of the arresting officer. The Court stated that the governmental interest in searching a person must be balanced against the "constitutionally protected interests" of the individual.[22] The pre-arrest search in *Sibron* was unreasonable because the exploration of the suspect's pocket was unrelated to the protective purpose of the search.[23] Thus in *Chimel*, the Court was justified by precedent in giving limited-search protection to the arrestee's home and personal property. This protection was based upon a requirement that probable cause exist for the search and that the scope of the search be limited by the purpose for its initiation.[24] The Supreme Court, in dealing with incident-search of an arrestee's automobile, has stated that the search must be closely related to the reason for arrest.[25] In *Cooper v. California*[26] the Court distinguished a previous case[27] saying that even probable cause to believe a car was stolen did not justify a search because the arrest was for vagrancy, not theft. The Court further stated that "[w]hether a search and seizure is unreasonable within the meaning of the fourth amendment depends upon the facts and circumstances of each case . . . ."[28] In *Chambers v. Maroney*[29] the Court used probable cause to justify a

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frisk the outer clothing for weapons if they have a reasonable belief that the suspect is armed and dangerous. The Court also said that:

> The scheme of the fourth amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

*Id.* at 21.

[20]392 U.S. 40 (1968).

[21]*Id.* at 67.

[22]*Id.* at 21, 29. "[A] search which is reasonable at its inception may violate the fourth amendment by virtue of its intolerable intensity and scope." *Id.* at 17-18; *accord*, Wolf v. State, 260 So. 2d 425 (Miss. 1972).

[23]The Court said, "The search was not reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the arresting officer by disarming a potentially dangerous man." 392 U.S. at 65.

[24]Chimel v. California, 395 U.S. 752 (1969).

[25]Cooper v. California, 386 U.S. 58 (1967). The Court held that a warrantless search of arrestee's automobile one week after arrest was reasonable because the search was closely related to the reason for arrest.

[26]*Id.*

[27]Preston v. United States, 376 U.S. 364 (1964).

[28]Cooper v. California, 386 U.S. 58, 59 (1967). The Court was discussing its decision in Preston v. United States, 376 U.S. 364 (1964).

[29]399 U.S. 42, 47-52 (1969).

warrantless search of an arrestee's automobile even though the search took place at the station house and was not incident to the arrest. The Court reasoned that since there was probable cause for a search at the time of arrest, the same probable cause existed at the station and justified the later search of the automobile for guns and stolen money.

Lower courts have had difficulty reconciling the concept of the protective-evidentiary search incident to arrest with the incident-search of a traffic violator.[30] Some courts have held that, absent special circumstances,[31] a traffic arrest does not automatically justify an incident-search of the arrestee because the nature of the crime precludes the existence of fruits or evidence and the only instrumentality is the car itself.[32] Other courts have held that an arrestee may be searched only if the officer reasonably believes him to be armed,[33] or if there is a rational connection between the search and the nature of the arrest.[34] The majority of courts, however, recognize the need for some type of protective search because of the risk to police involved in a full custody arrest.[35] Some

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[30]*See generally* Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 St. Louis U.L.J. 1 (1962); Cook, *Warrantless Searches Incident to Arrest*, 24 Ala. L. Rev. 607 (1972); Rothblatt, *The Arrest: Probable Cause and Search Without a Search Warrant*, 35 Miss. L.J. 252 (1964); Simeone, *Search and Seizure Incident to Traffic Violations*, 6 St. Louis U.L.J. 506 (1961); 78 Yale L.J. 443 (1969); 4 Willamette L.J. 247 (1967).

[31]Special circumstances include new evidence discovered after a vehicle is stopped; *e.g.*, United States v. Drew, 451 F.2d 230 (5th Cir. 1971); Nuez v. United States, 370 F.2d 538 (5th Cir. 1967); People v. Lopez, 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963), *cert. denied*, 375 U.S. 994 (1963) (officer saw a crowbar); State v. Krogness, 238 Ore. 135, 388 P.2d 120 (1963), *cert. denied*, 377 U.S. 992 (1964) (officer saw rifle); or suspicious movement in the vehicle; *e.g.*, McGee v. United States, 270 A.2d 348 (D.C. Ct. App. 1970); United States v. Thomas, 289 F. Supp. 364 (S.D.N.Y. 1968); People v. Sanson, 156 Cal. App. 2d, 319 P.2d 422 (1957) (defendant appeared to hide something under the seat); State v. Boykins, 50 N.J. 73, 232 A.2d 141 (1967) (driver indicated he would pull over but drove off at high speed); or when driver cannot prove ownership of car; *see, e.g.*, United States v. Jackson, 429 F.2d 1368 (7th Cir. 1970); Welch v. United States, 361 F.2d 214 (10th Cir. 1966).

[32]*See* People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433 (1960); People v. Mayo, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); People v. Zeigler, 358 Mich. 355, 100 N.W.2d 456 (1960) (defendant arrested for running stop sign); People v. Gonzales, 356 Mich. 247, 97 N.W.2d 16 (1959) (driving with one headlight). *Contra*, Self v. State, 98 So. 2d 333 (Fla. 1957) (no tail light); Arthur v. State, 227 Ind. 493, 86 N.E.2d 698 (1949) (doubtful ownership); Edmonds v. Commonwealth, 287 S.W.2d 445 (Ky. 1956) (no license plates); Watts v. State, 196 So. 2d 79 (Miss. 1967); Fuqua v. State, 246 Miss. 191, 145 So. 2d 152 (1962); Smith v. State, 240 Miss. 738, 128 So. 2d 857 (1961).

[33]*See* United States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); People v. Superior Court, 7 Cal. 3d 186, 496 P.2d 1205, 101 Cal. Rptr. 837 (1972); People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967).

[34]Warden v. Hayden, 287 U.S. 294 (1967); Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968); People v. Watkins, 19 Ill. 2d 11, 166 N.E.2d 433, *cert. denied*, 364 U.S. 833 (1960); Lane v. Commonwealth, 386 S.W.2d 743 (Ky. 1965).

[35]State v. Curtis, 290 Minn. 429, 190 N.W.2d 631 (1971) (removal of object exceeded scope of protective search); State v. O'Neal, 251 Ore. 163, 444 P.2d 951 (1968) (search of

courts which authorize a protective search have held that an officer may not remove an object from the arrestee's person knowing it is not a weapon,[36] and at least one court has held that where an officer feared that an innocent object concealed a weapon he should have put it out of reach until the search was completed rather than have examined its contents.[37]

In the instant case the Court determined that all custodial arrests must be treated alike, regardless of the context in which they arise, since the danger to the officer from "extended exposure" to the arrestee during a custodial arrest is far greater than in a *Terry*-type investigatory stop.[38] The Court further stated that since a lawful custodial arrest is reasonable under the fourth amendment[39] and since the right to search an arrestee's person had never been challenged,[40] there is no need further to justify a search according to its degree of intensity. The Court concluded that since the authority to search is derived from the arrest itself and not from the existence of weapons, fruits, or evidence of the crime for which the arrest is made, and since the scope of the search is determined by the arresting officer's "quick ad hoc judgment," it is unnecessary to adjudicate reasonableness in each case provided the search of the arrestee's person is incident to a lawful arrest.[41]

Justice Marshall,[42] writing for the dissent, accused the majority of abandoning the "fundamental principles"[43] of the fourth amendment which require that reasonableness be decided from the circumstances of each case and evaluated under the "neutral scrutiny"[44] of the judicial process. The dissent emphasized that it is the role of the judiciary and not the police to determine the reasonable scope of an incident-search since the fourth amendment requires judicial review of such "quick ad hoc judgments" made by law enforcement authorities.[45] Justice Marshall disputed the majority's statement that prior law supported the

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wallet held unreasonable); Barnes v. State, 25 Wis. 2d 116, 130 N.W.2d 264 (1964) (flashlight exploration of coat pocket unreasonable).

[36]United States v. Del Toro, 464 F.2d 520 (2d Cir. 1972) (removal of folded ten dollar bill unreasonable). The court said: "True, it could have been a razor blade; something of size and flexibility of a razor blade could be concealed virtually anywhere, and accordingly provide the pretext for any search, however thorough." *Id.* at 522. Tinney v. Wilson, 408 F.2d 912 (9th Cir. 1969) (removal of soft object held unreasonable); United States v. Gonzalez, 319 F. Supp. 563 (D. Conn. 1970). *Contra*, Worthy v. United States, 409 F.2d 1105 (D.C. Cir. 1968), in which Judge Sirica said the limited search in *Terry* "does not apply to a valid arrest" but also said that the scope should not exceed a permissible search for weapons. *Id.* at 1108-09.

[37]United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971).

[38]United States v. Robinson, 94 S. Ct. 467, 476 (1973).

[39]*Id.* at 477.

[40]Cases cited note 10 *supra*.

[41]94 S. Ct. at 477.

[42]Joined by Justices Douglas and Brennan.

[43]94 S. Ct. at 477.

[44]*Id.* at 478, *citing* Terry v. Ohio, 392 U.S. 1, 21 (1968); *see* Sibron v. New York, 392 U.S. 40, 59 (1968); Mapp v. Ohio, 367 U.S. 643, 647 (1961); Go-Bart Co. v. United States, 282 U.S. 344, 357 (1931); Weeks v. United States, 232 U.S. 383, 393 (1914).

[45]94 S. Ct. at 483.

idea of a full search of an arrestee's person since many lower court decisions have advocated a limited search in traffic arrest cases. The dissent further contended that the mere fact of arrest should not automatically qualify as reasonable the ensuing search, particularly in the instant case, since there was a separate search of the effects found upon the arrestee's person. Furthermore, Justice Marshall stated that application of the *Terry* doctrine to the instant case presented a difficult problem since the lack of probable cause to support a protective search of the traffic arrestee must be balanced against the increased danger involved in a full-custody arrest. The dissent, however, felt there was no need to solve the balancing problem in the instant case since the examination of the cigarette package *clearly* exceeded the protective purpose of the search and was therefore unreasonable under the fourth amendment.[46]

The instant decision is significant for its refusal to require a rational relationship between the scope of a search of an arrestee's person and the purpose for the search's initiation. The Court's reliance on the "unqualified authority"[47] of previous cases supporting the right to search an arrestee's person is misplaced since every case cited deals with *evidentiary* as well as *protective* searches. In the instant case the Court recognized that the only justification for a search in traffic arrest cases is protection of the arresting officer. In such cases the arrestee's offense is realistically different from the ordinary crime in which fruits or evidence of the crime may exist. Because of this distinction, the prerequisites for a typical search are simply not present during an arrest for a traffic violation. In this decision the Court has failed to provide a sound reason why the scope of the search should be identical in both situations.[48]The Court stated that the limited protective search in *Terry v. Ohio*[49] cannot apply to a probable cause arrest yet the same Court has used the *Terry* rationale to determine the reasonableness of incident-searches in *Chimel v. California*[50] and *Peters v. New York*.[51] While the purpose of the search in *Terry* and in the present case is identical, the Court held in *Terry* that a limited search provided adequate protection from an individual believed to be armed and dangerous. In the instant decision, however, the Court held that a more intensive search is necessary of one whose only crime is driving with a revoked license. The Court distinguished *Terry* on the basis of the arrestee's "extended exposure" to the officer during a custodial arrest. This is not, however, an adequate reason for allowing a full search of the arrestee's person, particularly when it is the *only* reason. The probability that

[46]*Id.* at 486, 488.

[47]Cases cited note 15 *supra*; Weeks v. United States, 232 U.S. 383 (1914); Holker v. Hennessey, 141 Mo. 527 (1897); Closson v. Morrison, 47 N.H. 484 (1867); Spalding v. Preston, 21 Vt. 9 (1848).

[48]The government advanced an alternative argument in the instant case that a full field search was justified since the arrestee would be subjected to an inventory search anyway upon his arrival at the station house. However, every arrest does not result in an inventory search since it is possible to post bail in many cases. United States v. Mills, 472 F.2d 1231 (D.D.C. 1972). *See generally* 53 Boston U.L. Rev. 858 (1973).

[49]392 U.S. 1 (1968).

[50]395 U.S. 752, 762 (1969).

[51]392 U.S. 40, 67 (1968).

a handcuffed traffic violator on his way to the station house will extricate from his person a straight pin or razor blade and attack the officer is too small to justify the serious intrusion upon fourth amendment rights resulting from a full search. A frisk of the outer clothing will provide sufficient protection for the arresting officer in all but the most unusual of cases. Thus the instant decision is irreconcilable with the fourth amendment guarantee of reasonableness because of the disparity between the purpose and the scope of the search. The holding in the present case is also contrary to the strict justification-limited scope rationale advocated in *Chimel v. California*.[52] The Court indicated in the instant case that the search of an arrestee's person has *no* practical limits provided it is not *"patently abusive"*[53] and that it needs no justification other than the fact of arrest. Consequently, the fourth amendment protections now enjoyed by the individual are drastically less than those given to his home and personal effects by the holding in *Chimel*.

The potential for abuse of the powers given to police by the instant decision is immediately obvious and certainly far-reaching since most individuals have their first serious encounter with the police in the context of a traffic violation. The greatest amount of discretion in our law enforcement system is given to the police officer on the street who most often makes the initial decision to arrest. The present case undeniably increases the rewards of discretionary enforcement at the expense of individual fourth amendment protections. The ability to use the traffic arrest as a pretext to search for evidence of unrelated crimes is perhaps the most dangerous power bestowed upon police by this decision. There is no rational relation between arrest for driving without a license and possession of contraband. As a result of this decision, however, the arresting officer needs no probable cause to search for evidence on the arrestee's person. It is therefore not inconceivable that policemen may enforce traffic laws more strictly against certain individuals premised upon a mere suspicion that they possess drugs or other contraband. Also, state legislatures might further enlarge this discretionary power through legislation designed to lessen the requirements of an arrestable offense or to increase the number of offenses which carry the alternative of arrest. Because of these possibilities for abuse it is essential that the Court concede the unique predicament of the traffic violator and abandon its *ipso facto* approach to the incident-search issue. The Court's refusal to acknowledge varying degrees of reasonableness in the search of an arrestee's person ignores the fundamental principle of the fourth amendment—"the right of the people to be secure in their *persons*" as well as to have their "houses, papers, and effects" protected against unreasonable searches and seizures. If the Court insists on adherence to the instant decision some adjustments will inevitably be demanded by the public to align the scope of the search more fairly with the nature of the offense.

It is difficult to find a reasonable solution for the incident-search problem

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[52]395 U.S. 752 (1969).

[53]United States v. Robinson, 94 S. Ct. 467, 477 (1973). The Court cited Rochin v. California, 342 U.S. 165 (1952), in which the defendant was forced to have his stomach pumped.

but it would seem unreasonable not to allow a protective search in traffic arrest cases. The major difficulty lies in the degree to which evidence of unrelated crimes, discovered during the protective search, will be admissible in the courts. A prohibition against admission of all evidence other than weapons is directly contra to the position taken in the instant case and appears unreasonable in light of the plain sight doctrine. The line must be drawn somewhere between evidence or contraband in plain view on an arrestee's person and evidence which may be discovered only after an intensive search, as in the instant case. Regardless of the scope, it is certainly for the judiciary and not the police to determine in each case whether the proper limit was observed. The Court, by allowing a full search, ignores the maxim that reasonableness requires a balance in every case between the governmental interest at stake and the infringement of protected rights.

*David T. Lail*

FEDERAL COURTS—THREE-JUDGE COURTS—APPLICABILITY OF SECTION 2281 EXPANDED TO DECLARATORY JUDGMENTS WHICH ARE INJUNCTIVE IN NATURE

Appellee, a prison inmate charged in a penitentiary disciplinary report, filed a petition[1] in federal district court against the Director of the Florida Division of Corrections requesting a declaratory judgment that the procedural safeguards promulgated pursuant to state regulations[2] governing prison disciplinary proceedings are unconstitutional. Appellee contended that he was administratively segregated[3] without a hearing and was denied rights secured by the 5th, 6th, and 14th amendments in a subsequent disciplinary hearing which determined that he should be punitively segregated.[4] Appellant testified that the corrective proceedings were conducted in accordance with disciplinary rules[5] adopted pursuant to state regulations. The District Court of the Middle District of Florida entered a declaratory decree stating the rights of the appellee to constitutional due process[6] and enjoined the appellant from enforcing a loss of

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[1]The plaintiff originally filed a petition which he characterized as a "writ of habeas corpus for relief and full compensation." The court *sua sponte* and in accordance with pretrial stipulation treated the petition as a civil complaint pursuant to 42 U.S.C. § 1983 (1970), seeking declaratory relief pursuant to 28 U.S.C. § 2201 (1970). Sands v. Wainwright, 357 F. Supp. 1062, 1068 (M.D. Fla. 1973). State prison practices usually are attacked by either a habeas corpus petition or a civil complaint pursuant to 42 U.S.C. § 1983 (1970). *See generally* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoner's Rights Litigation*, 23 STAN. L. REV. 473, 504-11 (1971). *See also* Preiser v. Rodriguez, 411 U.S. 475 (1973). There has been a vast increase of prison litigation in the federal courts, with most of the suits being brought under section 1983. *See* Recent Developments, *State Inmate's Challenge to Conditions of Prison Confinement Is Cognizable Under 42 U.S.C. § 1983 and Entails No Requirement of Exhaustion of State Remedies*, 72 COLUM. L. REV. 1078, 1079 (1972).

[2]FLA. STAT. § 945.21 (1971), provides in part:

> Regulations of the Division
>
> (1) The Division is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the Division. In addition to specific subjects otherwise provided for herein, regulations of the Division may relate to:
>
> (a) Conduct to be observed by prisoners;
>
> (b) Punishment of prisoners.

[3]This generally means confinement to one cell with a loss of inmate privileges which he would have enjoyed had he been assigned to the general inmate population. Sands v. Wainwright, 357 F. Supp. 1062, 1077 (M.D. Fla. 1973).

[4]This generally means confinement to one cell accompanied by (1) food rationing, (2) loss of gain time, extra gain time, special gain time, or gain time in advance, (3) loss of visiting privileges, or (4) loss of a substantial privilege which is allowed as a normal matter to an inmate confined in administrative segregation. *Id.* at 1078.

[5]2 FLA. ADMIN. CODE ch. 10 B-3.06 (1971).

[6]The district court held, *inter alia*: (1) that punitive and administrative segregation and the loss of any type gain time constitute "grievous losses"; (2) that prior to imposition of these losses prison authorities must conduct a hearing "appropriate to the nature of the loss" (the court included ten procedural safeguards when the loss is confinement in disciplinary segregation or loss of gain time and three less restrictive requirements when the loss is administrative segregation); and (3) that under its present rules and regula-

time penalty against the appellee. On appeal to the Fifth Circuit Court of Appeals, *held,* vacated and remanded. Where the district court granted a declaratory judgment and further enjoined a state officer from enforcing rules promulgated pursuant to statewide regulations on the grounds of unconstitutionality of such regulations as applied, the nature of the judgment is injunctive within the meaning of section 2281 and a three-judge district court must be convened in accordance with 28 U.S.C. § 2284. 491 F.2d 417 (5th Cir. 1973) (en banc).

Three-judge district courts were first authorized in 1903.[7] Although this was an era of "devout federalism,"[8] federal equity power was essentially unrestricted.[9] Thus the extent to which state regulations could be enjoined by federal courts became a major constitutional issue.[10] When the Supreme Court, in *Ex Parte Young,*[11] permitted federal courts to enjoin the enforcement of state statutes and regulations on the basis of their unconstitutionality, a major tug of war between state and federal powers ensued.[12] In response to *Ex Parte Young*, a three-judge court statute was adopted by Congress.[13] There are several accounts of the history of the three-judge court and the interests that it was designed to protect.[14] The original statute has been substantially expanded since 1910,[15] and

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tions, Florida did not meet the constitutionally required procedures. Sands v. Wainwright, 357 F. Supp. 1062, 1068-96 (M.D. Fla. 1973).

[7]Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823. The three-judge courts were first used to deal with anti-trust suits.

[8]*See* Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation,* 43 HARV. L. REV. 426, 428 (1930).

[9]Hutcheson, *A Case For Three Judges,* 47 HARV. L. REV. 795, 807-10 (1934).

[10]Comment, *Why Three-Judge District Courts*?, 25 ALA. L. REV. 371, 372 (1973).

[11]209 U.S. 123 (1908).

[12]*See generally* 42 CONG. REC. 4847-59 (1908).

[13]Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557, *as amended* 28 U.S.C. § 2281 (1970). The 1910 Act required that all actions seeking interlocutory injunctions restraining the enforcement of allegedly unconstitutional statutes must be heard and determined by a three-judge court.

[14]*See generally* C. WRIGHT, LAW OF FEDERAL COURTS § 50 (2d ed. 1970); Ammerman, *Three Judge Courts: See How They Run*!, 52 F.R.D. 293 (1971); Currie, *Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1 (1964); Hutcheson, *supra* note 9, at 795; Comment, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 539 (1963); Note, *Three-Judge Court Practice Under Section 2281,* 53 GEO. L.J. 431 (1965); Note, *The Three-Judge District Court: Scope and Procedure Under 2281,* 77 HARV. L. REV. 299 (1963) [hereinafter cited as *Scope and Procedure*]. The following reasons for enactment of Section 2281 are generally accepted: (1) to prevent damage to state pride resulting from federal injunctions against state statutes by single judges; (2) to improve the deliberation of the suit; and (3) to maintain state superiority in the field of economic regulation and to protect regulatory programs already enacted. Comment, *supra* note 10, at 374-75.

[15]*Compare* Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 *with* Act of Mar. 4, 1913, ch. 160, § 266, 37 Stat. 1013 (original Act amended to include administrative orders) *and* Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 936 (amended Act to require three judges in suits for permanent injunctions) *and* Act of June 25, 1948, ch. 646, §§ 2281-84, 62 Stat. 936 (amended Act to require three judges to issue permanent injunctions whether or not

the Act now requires that when: (1) an interlocutory or permanent injunction is sought (2) to restrict a state officer (3) from enforcing a state statute or order made by an administrative board or commission acting pursuant to state statute (4) on constitutional grounds, a three-judge court must be impaneled.[16] The Supreme Court has adopted a policy of strict construction in applying the statute.[17] While section 2281 is clear in theory, the task of defining the kinds of cases that fall within the statute has proven complex.[18] Since the statute's first interpretation in *Ex Parte Metropolitan Water Co.*,[19] the Court has defined essentially every key word and phrase of section 2281.

In order to come within the scope of section 2281, the complaint must seek injunctive relief.[20] A complaint seeking injunctive and declaratory relief also falls within the statute.[21] There has been considerable controversy over whether

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petitioner seeks an interlocutory injunction) *and* 28 U.S.C. § 2281 (1970).

[16]The present statute reads:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under Section 2284 of this title.

28 U.S.C. § 2281 (1970).

[17]Phillips v. United States, 312 U.S. 246, 250-51 (1941). *See also* Board of Regents v. New Left Educ. Project, 404 U.S. 541, 545 (1972); Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). The reasons generally given for the adoption of this policy are: (1) burdens imposed upon the lower courts, Phillips v. United States, *supra* at 251; and (2) burdens imposed upon the Court due to the mandatory direct review of three-judge rulings, Florida Lime & Avocado Growers Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (dissenting opinion).

[18]Currie, *supra* note 14, at 12-13. Section 2281 is "long-winded, repetitive, and sloppy in draftsmanship. . . . Such a prolix statute could hardly have escaped serious problems of interpretation." *Id.*; *see* Comment, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives,* 62 J. CRIM. L.C. & P.S. 205 (1971).

[19]220 U.S. 539 (1911).

[20]Flemming v. Nestor, 363 U.S. 603 (1960). There are various federal statutes dealing with the use of federal injunctive power. D. DOBBS, REMEDIES § 2.12, at 133 (1973). *See, e.g.,* 28 U.S.C. § 2281 (1970); 28 U.S.C. § 2283 (1970) provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

[21]*See, e.g.,* Story v. Roberts, 352 F. Supp. 473 (M.D. Fla. 1972). The Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1970) provides:

> § 2201 Creation of Remedy
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> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
>
> § 2202 Further Relief

a suit solely for a declaratory judgment might fall within the meaning of "injunctive relief" and thus within the scope of section 2281.[22] Thus far the Supreme Court has refused to apply section 2281 to suits merely seeking declaratory judgments.[23] Various commentators, however, have asserted that declaratory judgments should fall within the scope of section 2281 since they may serve as the basis for a subsequent injunction against the enforcement of a state or federal statute.[24] As to the application of section 2281 "injunctive relief" to

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Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

The following reasons for the enactment of the Declaratory Judgment Act are generally accepted: (1) to provide anticipatory relief; (2) to provide an alternative to and prevent abuse of injunctions; and (3) to reduce the economic burden in the determination of federal rights. *See* Note, *The Res Judicata Effect of Declaratory Relief in the Federal Courts*, 46 S. CAL. L. REV. 803, 805-09 (1973).

[22]Proponents for a broadening of the statute in this area seem to feel that "while 'injunction' is a term of art, it should be construed to effectuate the statutory purpose; 'injunction' can reasonably be interpreted to include all decrees or judgments whose effect is substantially the same, with no respect to the purposes of the three-judge statutes, as that of traditional injunction." Currie, *supra* note 14, at 15. Sentiment for an expansive interpretation of "injunctive relief" seems to run high. *See, e.g., id.* at 13-20; Comment, *Applicability of the Three-Judge Court in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in the Jet Age?*, 21 AM. U.L. REV. 417, 426 (1971) [hereinafter cited as *Applicability of the Three-Judge Court*]; Comment, *The Three-Judge Federal Court in Challenges to State Action*, 34 TENN. L. REV. 235, 239-40 (1967); Comment, *The Three-Judge Court in Contemporary Jurisdiction*, 41 WASH. L. REV. 877, 892-94 (1966).

[23]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963) (a landmark decision holding that a suit for declaratory relief was not within 28 U.S.C. § 2282 [the analogous federal statute to section 2281] because the original request for an injunction had been abandoned before trial); Flemming v. Nestor, 363 U.S. 603 (1960); *see* Mitchell v. Donovan, 398 U.S. 427 (1970) (where the Supreme Court held that when only declaratory relief was sought, it had no jurisdiction to consider an appeal under section 1253, which provides for direct appeal to the Supreme Court from a three-judge court). *See also* Nieves v. Oswald, 477 F.2d 1109 (2d Cir. 1973), in which prison inmates of Attica Correctional Facility petitioned for injunctive relief against the holding of prison disciplinary hearings and punishment without constitutional procedural safeguards. The court held the case came within section 2281. The court, however, indicated that had the inmates sought only declaratory relief, there would have been no necessity for remand for trial by a three-judge court since the case would not have been within the scope of section 2281; Whatley v. Clark, 482 F.2d 1230 (5th Cir. 1973); Triple A Realty, Inc. v. Florida Real Estate Comm'n, 468 F.2d 245 (5th Cir. 1972); E. BORCHARD, DECLARATORY JUDGMENTS 366-67 (2d ed. 1941). *But see* Mitchell v. Donovan, 398 U.S. 427 (1970) (dissenting opinion) (where Justice Douglas asserts that the *Kennedy* case did not address the question whether three-judge courts are necessary when a declaratory judgment is sought); Jeannette Rankin Brigade v. Chief of Capitol Police, 421 F.2d 1090 (D.C. Cir. 1969), *rev'd and remanded*, 342 F. Supp. 575 (1972) (three-judge court), *aff'd*, 409 U.S. 972 (1973).

[24]*See* Cleary, *Developments in the Law — Declaratory Judgments*, 62 HARV. L. REV. 787, 869-70 n.654 (1949) (pointing out that this problem seldom arises since a request for a declaratory judgment is usually accompanied by a prayer for injunctive relief); Comment, *The Three-Judge Federal Court in Challenge to State Action*, *supra* note 22, at 240.

injunctive orders issued subsequent to the declaratory judgment, there has been only limited Supreme Court litigation.[25] In interpretative contexts other than section 2281, the Court has pointed out that a declaratory judgment might have the same effect as an injunction.[26] In order to come within the scope of section

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*See also* 28 U.S.C. §§ 2202, 2283 (1970). There are several cases asserting the possibility of the issuance of an injunction subsequent to a declaratory judgment. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 499 (1969), where the Court stated: "A court may grant declaratory relief even though it chooses not to issue an injunction or mandamus. (citations omitted) A declaratory judgment can then be used as a predicate to further relief, including an injunction." *But see* text accompanying note 25 *infra* (declaratory judgments are not allowed to lie where injunctions cannot be issued). *See also* Vermont Structural Slate Co. v. Tatko Bros. Slate Co., 253 F.2d 29 (2d Cir. 1958); 2 W. ANDERSON, ACTIONS FOR DECLARATORY JUDGMENTS § 451 (2d ed. 1951); E. BORCHARD, *supra* note 23, at 438-42. It is generally accepted that the main characteristic of a declaratory judgment is that it declares the rights of the litigants without appendage of a coercive decree, and injunctive relief should thus be granted with reluctance. *See id.* § 458, at 1074; Note, *supra* note 21, at 847-48. See 2 W. ANDERSON, *supra* at § 451, and E. BOACHARD, *supra* note 23, at 441, for an analysis of the procedure for receiving a subsequent injunction.

[25]*See* Jeannette Rankin Brigade v. Chief of Capitol Police, 421 F.2d 1090 (D.C. Cir. 1969), *rev'd and remanded*, 342 F. Supp. 575 (1972) (three-judge court), *aff'd*, 409 U.S. 972 (1973). The court of appeals held that where a trial court's declaratory ruling of the unconstitutionality of a statute prohibiting assemblages on the United States Capital grounds might deem an injunctive order appropriate to accompany its declaration and thus have a "restraining effect comparable to injunctive relief," a three-judge district court would not lose its jurisdiction over the case because the plaintiffs withdrew their previous request for injunctive relief. 421 F.2d at 1094. On remand, the three-judge district court complied with the plaintiffs' renewed demands for a permanent injunction. Upon direct appeal to the Supreme Court, the decision of the three-judge court was summarily affirmed. There is considerable controversy whether there is any precedential value in a Supreme Court summary affirmance without opinion in a case within the Court's obligatory appellate jurisdiction. *Compare* Doe v. Hodgson, 478 F.2d 537 (2d Cir. 1973) *with* Dillenburg v. Kramer, 469 F.2d 1222 (9th Cir. 1972).

[26]Samuels v. Mackell, 401 U.S. 66 (1971) (This was a case in which a pending state criminal prosecution was under consideration. In deciding that the considerations for denial of injunctive relief were equally appropriate for declaratory relief, the court held that in order for a declaratory judgment permissibly to interfere with state proceedings it must meet the same standards applicable to injunctions. A primary consideration of the court was that "after a declaratory judgment is issued the district court may enforce it by granting '[f]urther necessary or proper relief,' 28 U.S.C. § 2202, and therefore a declaratory judgment issued while state proceedings are pending might serve as the basis for a subsequent injunction against those proceedings to 'protect or effectuate' the declaratory judgment, 28 U.S.C. § 2283, and thus result in a clearly improper interference with the state proceedings." *Id.* at 72); Great Lakes Dredge & Dock Co. v. Huffman, 319 U.S. 293 (1943) (where considerations which led federal courts of equity to refuse to enjoin the collection of state taxes, save in exceptional cases, required a like restraint in the use of declaratory judgments); Babitz v. McCann, 320 F. Supp. 219 (E.D. Wis. 1970), *vacated*, 402 U.S. 903 (1971). *But see* Steffel v. Thompson, 94 S.Ct. 1209 (1974) (The court stated that the same considerations of equity, comity, and federalism which formed the basis of Younger v. Harris, 401 U.S. 37 (1971), and Samuels v. Mackell, 401 U.S. 66 (1971), do not come into play when there is no state criminal prosecution pending. In stressing that

2281, the complaint must challenge the constitutionality of a state statute or an administrative order.[27] The courts have given "state statute" a rather broad definition. In *Phillips v. United States*,[28] the Court held that a three-judge court is required when "a suit . . . seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' "[29] In *American Federation of Labor v. Watson*,[30] the Court added that the term includes "all enactments, however adopted, to which a state gives the force of law."[31] Thus, in *Gilmore v. Lynch*,[32] the Ninth Circuit held that a suit by prison inmates seeking to enjoin enforcement of rules adopted by the California Director of Corrections came within the scope of section 2281. Although the courts have broadly interpreted the classes of enactments which fall within the meaning of "state statute," the actual application of this term has been narrowly construed.[33] In *Spielman Motor Sales Co. v. Dodge*,[34] the Court held that in order to come within the scope of section 2281 the statute attacked must be of "general application" and of "statewide interest and concern."[35] Some confusion exists in this area since there is no definite standard for determining when a case presents a matter of statewide interest and concern.[36] There are, however, several cases which demonstrate the Court's demand

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a declaratory judgment is a "milder alternative" than the injunction, the court held that in granting declaratory relief when there is no pending prosecution, the trial court should not apply the injunctive standard of irreparable injury.) It must be pointed out that the Court did not rule upon the propriety of the issuance of a subsequent injunction based upon the declaratory judgment, 28 U.S.C. § 2202 (1970) and 28 U.S.C. § 2283 (1970). *Compare* Steffel v. Thompson, 94 S.Ct. 1209 (1974) (White, J., concurring), *with id.* (Rehnquist, J., concurring). *See also* Note, *supra* note 21, at 845-49. The Supreme Court has evidenced a willingness to determine that suppression orders are "injunctive orders" within the scope and application of 28 U.S.C. § 1253 (1970) "injunctive relief." (Section 1253 deals with direct appeal to the Supreme Court from three-judge courts.) *See* Perez v. Ledesma, 401 U.S. 82, 84 (1971).

[27]28 U.S.C. § 2281 (1970).

[28]312 U.S. 246 (1941).

[29]*Id.* at 251.

[30]327 U.S. 582 (1946).

[31]*Id.* at 592.

[32]400 F.2d 228 (9th Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969), *aff'd on remand*, 319 F. Supp. 105 (N.D. Cal. 1970). *See also* Nieves v. Oswald, 477 F.2d 1109, 1114 (2d Cir. 1973) (where the court held that a constitutional attack on prison regulations "sufficiently implicates well-considered state policy of state-wide application" to fall within the statute).

[33]*See Ex Parte* Collins, 277 U.S. 565, 567 (1928).

[34]295 U.S. 89 (1935).

[35]*Id.* at 94; *accord,* Rorick v. Board of Comm'rs, 307 U.S. 208 (1939).

[36]Some of the factors considered are: (1) whether the statute applies only to a limited geographic area; (2) whether a decision against the state will have far-reaching effects; and (3) whether the attacked actions, though affecting only one area of the state, reflect state policy. Note, *Three Judge Courts, Some Problems and a Proposal*, 54 CORNELL L. REV. 928, 934-35.

for statewide applicability of a state statute or regulation.[37] *Board of Regents v. New Left Education Project*[38] is a recent example of the Court's interpretation. In order to come within the scope of section 2281, the complaint must seek to enjoin the action of a "state officer" or an order made by an "administrative board or commission." The Court's interpretation of "state officer" has limited the term's application to those officials who are enforcing a statute having statewide effect.[39] A single individual has been held sufficient to constitute an "administrative board or commission" within the meaning of section 2281. In *Gilmore v. Lynch*,[40] the Ninth Circuit held that a regulation promulgated by one man which is "statewide in its application . . . is as effective and authoritative in its establishment of state policy as if it had been announced by a board of more than one member."[41] A suit for injunctive relief against a state statute or regulation must be brought upon the ground of unconstitutionality, and the claim must rely on the federal constitution.[42] In *Ex Parte Poresky*,[43] however, the Supreme Court held that when the complaint fails to present a substantial federal question, a single judge may dismiss for lack of federal jurisdiction. The Court stated that a question is insubstantial if it is " 'obviously without merit' or because 'its unsoundness . . . clearly results from the previous decisions . . . .' "[44] The Court extended the *Poresky* rationale in *Bailey v. Patterson*[45] by holding that a single-judge court could issue an injunction against a state statute when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional."[46] A suit to enjoin a state statute or regulation which is constitutional on its face still requires the convening of a three-judge court if the statute or regulation is unconstitutional as applied to the complainant.[47] Section 2281 is interpreted as a jurisdictional statute, and a single judge

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[37]*See, e.g.*, Moody v. Flowers, 387 U.S. 97, 101 (1967); Sailors v. Board of Educ., 387 U.S. 105 (1967); Griffin v. County School Bd., 377 U.S. 218 (1964).

[38]404 U.S. 541 (1972). The Court held that a three-judge court is not required when the "statute or regulation is of only local import . . . ." *Id.* at 542-43.

[39]*See, e.g.*, City of Cleveland v. United States, 323 U.S. 329 (1945) (holding that a local official collecting taxes was a "state officer" within the meaning of the statute since the tax statute was of statewide concern); *Ex parte* Public Nat'l Bank, 278 U.S. 101 (1928) (holding that a city official collecting taxes pursuant to a state statute was not a "state officer" since the taxes were applied for strictly local purposes).

[40]400 F.2d 228 (9th Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969).

[41]*Id.* at 230.

[42]Florida Lime & Avocado Growers Inc. v. Jacobsen, 362 U.S. 73 (1960).

[43]290 U.S. 30 (1933).

[44]*Id.* at 32.

[45]369 U.S. 31 (1962).

[46]*Id.* at 33 (citations omitted); *accord*, Rosado v. Wyman, 397 U.S. 397 (1970); Turner v. City of Memphis, 369 U.S. 350 (1962). *But see* Currie, *supra* note 14, at 65; Comment, *supra* note 18 at 208-09; Note, *supra* note 36, at 931-33.

[47]Turner v. Fouche, 396 U.S. 346 (1970); Department of Employment v. United States, 385 U.S. 355 (1966); Query v. United States, 316 U.S. 486 (1942); *Ex Parte* Bransford, 310 U.S. 354 (1940). *See also* Nieves v. Oswald, 477 F.2d 1109, 1113 (2d Cir. 1973).

has no power to try a case which falls within the statute.[48] A jurisdictional defect cannot be waived by the parties to a lawsuit.[49] Once an appellate court finds a case falls within section 2281, it must, on its own motion, remand the case for trial by a three-judge court.[50]

In the instant case, the court found that since the plaintiff had petitioned the court on federal constitutional grounds to enjoin the Director of Corrections from enforcing the state regulations as applied, and since the district court granted a declaratory judgment setting forth the minimum procedures required by the Constitution and subsequently ordered that these procedures be implemented, the impact of the judgment was injunctive and thus was a type of relief within the scope of section 2281. As to the question of regulations promulgated by one man rather than by an "administrative board or commission," the court ruled that since the regulations are statewide in their application, their effectiveness and authoritativeness in establishing state policy is equal to that of a board of more than one member.[51] The court concluded that since the case passed all tests which determine the jurisdiction of a three-judge court and since section 2281 is a jurisdictional statute[52] and jurisdictional defects cannot be waived,[53] the case must be vacated and remanded for proceedings pursuant to section 2284 which lead to the convening of a three-judge court.[54]

The instant decision is representative of the federal judiciary's growing impatience with section 2281. Many of the standards applied by the courts to determine the scope of section 2281 have caused confusion. Important issues concerning interpretation of section 2281 are raised in defining such statutory terms as "state statute," "administrative board or commission," "administrative order," "unconstitutionality," and "injunction." The instant decision extends section 2281 to its furthest limits. In examining the district court's order and determining that the nature of the judgment was injunctive rather than declaratory, the court goes to the underlying policy of the statute.[55] The Su-

[48]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962).

[49]*See* Mitchell v. Maurer, 293 U.S. 237 (1934).

[50]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Borden Co. v. Liddy, 309 F.2d 871 (8th Cir. 1962). For a discussion of the strengths and weaknesses of section 2281 and some proposals, see Jackson v. Choate, 404 F.2d 910 (5th Cir. 1969) (Fifth Circuit is very liberal in applying § 2281);Currie, *supra* note 14, at 78-79; *Applicability of the Three-Judge Court, supra* note 22, at 438-39; *Scope and Procedure, supra* note 14, at 316-19; Comment, *supra* note 10, at 384-88; Comment, *supra* note 36, at 316-17.

[51]Gilmore v. Lynch, 400 F.2d 228 (9th Cir. 1968).

[52]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[53]*See* Mitchell v. Maurer, 293 U.S. 237 (1934).

[54]Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (en banc) (Brown, C.J. & Coleman, J. concurring). Chief Judge Brown expressed great displeasure with the present statute and states that maybe this decision will "stimulate the House into joining the Senate in § 663 and § 271 (which repealed 28 U.S.C.A. 2281, 2282) by which the requirements of a three-judge court are substantially eliminated." *Id.* at 431.

[55]*See, e.g.*, Phillips v. United States, 312 U.S. 246, 251 (1941) (where the court stated that the purpose of the statute is to protect state legislative intent from the "improvident" statewide doom of the federal court). For the reasons why the statute was enacted see note 14 *supra*.

preme Court and circuit court decisions adhere to an interpretative policy of judicial efficiency in not requiring a three-judge court when only declaratory relief is sought.[56] Since it is generally accepted that a declaratory judgment presents a milder form of relief emphasizing a declaration of the party's rights rather than coercive relief,[57] it would seem illogical to apply section 2281 to all declaratory judgments. The circuit court's interpretation of "injunctive relief," however, is a logical and necessary extension of section 2281 as it applies to the statute only when the "true impact of the court's judgment [is] injunctive . . . ."[58]

In finding that the regulation in question was within the definition and application of "state statute" and that the single Divisional Director constituted an "administrative board," the court cited with approval *Gilmore v. Lynch*,[59] a case which affords a liberal interpretation of these terms. In this determination the court may have contradicted *Board of Regents v. New Left Education Project*,[60] since the regulation did not apply to the city and county jails of the state.[61] Attempts to define clearly the types of enactments which have "statewide application or effectuate a statewide policy"[62] have failed.[63] The court of appeals found that since the statute is jurisdictional,[64] there can be no waiver

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[56]*See, e.g.*, Mitchell v. Donovan, 398 U.S. 427 (1970); Whatley v. Clark, 482 F.2d 1230 (1972). See also Jeannette Rankin Brigade v. Chief of Capitol Police, 421 F.2d 1090, 1103-05 (D.C. Cir. 1969) (dissenting opinion), *rev'd and remanded*, 342 F. Supp. 575 (1972) (three-judge court), *aff'd*, 409 U.S. 972 (1973).

[57]*See, e.g.*, 2 W. ANDERSON, *supra* note 24, § 458, at 1074; Note, *supra* note 21, at 847-48. *See also* Steffel v. Thompson, 94 S.Ct. 1209 (1974); Perez v. Ledesma, 401 U.S. 82 (1971) (separate opinion).

[58]Sands v. Wainwright, 491 F.2d 417, 426 (5th Cir. 1973) (en banc); *see* notes 24 & 25 and accompanying text *supra*; *cf.* note 26 and accompanying text *supra*. The court of appeals points out that the district court could not have satisfied the petitioner's request without an injunction. The court should have expounded on the effect of its ruling; instead the following effects are assumed. When it appears to the district judge that in granting a declaratory judgment further injunctive relief will be necessary and proper he should request the convening of a three-judge court. Should a situation arise subsequent to the declaratory judgment where further injunctive relief is necessary and proper, the district judge should request the convening of a three-judge court. Failure to do so will result in remand to a three-judge court upon appeal. *See also* Triple A Realty, Inc. v. Florida Real Estate Comm'n, 468 F.2d 245, 247 (5th Cir. 1972) (It may be possible to distinguish this case from *Sands* on the basis that the parties did not seek an injunction, and thus the issuance of the injunction was not "necessary and proper." The court, however, does not address the issue of whether the injunctive relief was considered part of the declaratory judgment or an ordinary injunction). For an analysis of the procedures for supplementary relief, see 2 W. ANDERSON, *supra* note 24, at § 451, and E. BORCHARD, *supra* note 23, at 441.

[59]400 F.2d 228 (9th Cir. 1968), *cert. denied*, 393 U.S. 1092 (1969).

[60]404 U.S. 541 (1972).

[61]For the instant court's philosophy on this issue, see Guarjardo v. Estelle, 491 F.2d 417, 429 (5th Cir. 1973) (en banc).

[62]Board of Regents v. New Left Educ. Project, 404 U.S. 541, 542-43 (1972).

[63]*See* note 36 *supra*.

[64]Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Borden Co. v. Liddy, 309 F.2d

of the requirement for a three-judge court.[65] In pointing out that neither of the parties objected to the single judge, however, the court impliedly favored waiver of jurisdiction. This aspect of the decision, however, revealed that there are instances in which a three-judge court is unnecessary and that waiver should be permitted. In an age when the machinery of state, local, and administrative government is so complex, it is unrealistic to allow one broad, sweeping section to encompass, distinguish, and define every facet of state governmental operations. As of yet Congress has failed to enact legislation redefining the purposes and scope of the three-judge statute.[66] Severe restriction or abolishment of section 2281 by Congress, however, could produce the same problems which led to its enactment.[67] There are also crucial situations in which the states should have the benefit of direct appeal to the Supreme Court, for which this statute provides.[68]

Should the Supreme Court *strictly* adhere to the policies of previous decisions, the instant case will probably be reversed.[69] The *Steffel* and *Sands* cases, however, exemplify confusion surrounding the effect of application of declaratory relief and question the nature and coerciveness of declaratory judgments. Thus the Supreme Court may soon be forced to expound on the effect and coerciveness of declaratory judgments when their enforcement comes into conflict with other judicial rulings[70] and statutes.[71] Should *Sands* survive the appellate process and absent a Congressional redefinition and clarification of the statute's scope, the judicial system will be literally swamped with cases requiring the convening of a three-judge court. The increasing number of cases seeking

871 (8th Cir. 1962).

[65]*See* Mitchell v. Maurer, 293 U.S. 237 (1934).

[66]*See* Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1973) (en banc) (Brown concurring).

[67]*See, e.g., Scope and Procedure, supra* note 14, at 303.

[68]*See, e.g,* Forston v. Morris, 385 U.S. 231 (1966), *motion for rehearing denied,* 385 U.S. 1021 (1966) (When no gubernatorial candidate received a majority, the election was passed to the state legislature pursuant to the state constitution. A three-judge district court subsequently enjoined the legislature from proceeding. Upon direct appeal pursuant to section 1253 the three-judge court decision was reversed. A possible standstill was averted as the Court's decision was handed down only 34 days after the gubernatorial election).

[69]*See, e.g.,* Board of Regents v. New Left Educ. Project, 404 U.S. 541 (1972); Mitchell v. Donovan, 398 U.S. 427 (1970); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

[70]For an analysis of the coerciveness and effect of declaratory judgments on subsequent pending state criminal prosecutions when the judgment was initially issued while there was no state prosecution pending *compare* Steffel v. Thompson, 94 S.Ct. 1209 (1974) (White, J., concurring), *with id.* (Rehnquist, J., concurring). In order to avoid a direct compromise of the purposes of the Declaratory Judgment Act or of the judicial rulings of the *Younger* and *Samuels* cases, the Court should perhaps consider imposing the *Younger* and *Samuels* standards of irreparable injury to section 2202 injunctions issued subsequent to declaratory judgments, which were granted when there was no pending state criminal prosecution.

[71]For an analysis of this issue in regard to section 2281 see notes 57 & 58 and accompanying text *supra.*

federal judicial review of state prison practices[72] provides an excellent example of the far-reaching effects the instant case might have. In the majority of these cases the prisoners are challenging the constitutionality of the state statute or regulation and are seeking declaratory or injunctive relief.[73] A three-judge court would be required to determine those cases in which the "true impact of the court's judgment [is] injunctive . . . ."[74]

The importance of the instant case is that the court manifests a trend to expand the meaning of the terms of section 2281. In redefining the scope and applicability of section 2281, the court refuses to compromise the underlying statutory policy for the sake of judicial efficiency.

*Hiram C. Eastland, Jr.*

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[72]*See generally* Turner, *Establishing the Rule of Law in Prisons: A Manual for Prisoners' Rights Litigation*, 23 STAN. L. REV. 473 (1971); Recent Developments, 72 COLUM. L. REV. 1078 (1972).

[73]*See, e.g.*, McDonnell v. Wolff, 483 F.2d 1059 (8th Cir. 1973); Krause v. Schmidt, 479 F.2d 701 (7th Cir. 1973); Rodriguez v. McGinnis, 456 F.2d 79 (2d Cir. 1972); Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968). These cases arise out of similar fact situations to *Sands* and would probably fall within the scope of the instant case. Although a detailed study of the relief and the applicability of the regulations would be required for complete accuracy, at least two circuits seem to have allowed the lower courts to grant injunctive relief without even mentioning the necessity of a three-judge court. *See* Krause v. Schmidt, *supra*; Sostre v. McGinnis, *supra*.

[74]Sands v. Wainwright, 491 F.2d 417, 426 (5th Cir. 1973) (en banc).

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